CASES

ON

PUBLIC SERVICE COMPANIES

PUBLIC CARRIERS, PUBLIC WORKS, AND OTHER PUBLIC UTILITIES

THIRD EDITION

BY

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PREFACE

THIS collection of cases is designed to show the development of the law of public service in its most modern forms: the public carriers, the public works, and the other public utilities. The distinction between the private callings — the rule — and the public callings — the exception — is a striking feature of the law governing business relations as it is to-day. The causes of the division are economic rather than strictly legal. Free competition, the very basis of the modern social organization, superseded almost completely medieval restrictions, but it has just come to be recognized that the process of free competition fails in some cases to secure the public good, and it has been reluctantly admitted that some control is necessary over such lines of industry as are affected with a public interest. At this point the problem of public callings becomes a legal one.

No one can carefully study the authorities on this subject without feeling that we are just entering upon a great and important development of the common law. What branches of industry will eventually be of such public importance as to be included in the category of public callings, and to what extent the control of the courts will be carried in the effort to solve by law the modern economic problems, it would be rash to predict. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure,

have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public service companies in all contingencies may the business of these companies be left in private hands.

As a result of the present state of the law it has seemed essential to bring together examples of every sort of public calling. Here will be found decisions concerning coaches and ships, the turnpike and the toll-bridge, the railway and the tram, the inn and the warehouse, the telegraph and the telephone, the purveyors of light and water. Materials are thus provided for analogy and comparison, and for a careful study of the rights and duties of persons engaged in every sort of public employment.

When this preface was first written in 1902 this unity of the public service law had not been generally perceived; now it is a recognized branch of the law, recognized by all as of overshadowing importance. An impressive instance of this growth in the law is the number of fundamental cases which the last few years have produced that have been added to this new edition.

This collection is intended primarily for use as a basis for class discussion in a law school, and the choice and arrangement of cases have been directed to that end. Cases have been abridged with freedom, but the fact has always been indicated. The annotation is not exhaustive, but is intended to draw the attention of students to a variety of cases, valuable for purposes of study, which bear upon the subjects discussed in the text. The subdivisions are kept few and general so as to leave the student to formulate the law for himself without the interference of the editor.

B. W.

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CASES ON PUBLIC SERVICE COMPANIES.

CHAPTER I.

NATURE OF PUBLIC CALLING.

ANONYMOUS.

COMMON PLEAS, 1441.

[*Y. B.* 19 *H. VI.* 49, *pl.* 5.]

WRIT of Trespass on the case against one R., a horse doctor, to the effect that the defendant assumed to him at London to cure his horse of a certain trouble, and that he then so negligently and carelessly gave the medicines, etc., that the horse, etc. . . .

PASTON, J. You have not shown that he is common surgeon to cure such horses, and, therefore, although he has killed your horse by his medicines you shall have no action against him without an assumpsit.

ANONYMOUS.

KING'S BENCH, 1450.

[*Keilway*, 50, *pl.* 4.]

NOTE, That it was agreed by the court, that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not sound in covenant. . . . Note, That in this case a man shall have no action against innkeeper, but shall make complaint to the ruler, by 5 Ed. IV. 2; *contra*, 14 Hen. VII. 22.

JACKSON *v.* ROGERS.

KING'S BENCH, 1683.

[2 *Shower*, 327.]

Action on the case, for that whereas the defendant is a common carrier from London to Lymmington *et abinde retrorsum*, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by JEFFERIES, C. J., that the action is maintainable, as well as it is against an innkeeper[1] for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

NOTE, That it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.

ALLNUTT *v.* INGLIS.

KING'S BENCH, 1810.

[12 *East*, 527.]

Lord ELLENBOROUGH, C. J.[2] The question on this record is whether the London Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will

[1] "Because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade." HOLT, C. J., in Lane *v.* Cotton, 12 Mod. 484. — ED.

[2] This opinion only is given; it sufficiently states the case. — ED.

take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. The question then is, whether circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord HALE, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord HALE puts the case either way; where the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either "because they are the wharfs only licensed by the queen, or because there is no other wharf in that port, as it may fall out: in that case (he says) there cannot be taken arbitrary and exeessive duties for cranage, wharfage, &e.: neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter." And then he assigns this reason, "for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only." Then were the company's warehouses juris privati only at this time? The legislature had said that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company, but for the good of trade. The first clause (43 G. 3, c. 132, the general warehousing act) says that it would greatly tend to the encouragement of the trade and commerce of G. B., and to the accommodation of merchants and others, if certain goods were permitted to be entered and landed and secured in the port of London without payment of duties at the time of the first entry: and then it says that it shall be lawful for the importer of certain goods enumerated in table A. to secure the same in the West India dock warehouses: and then by s. 2 other goods enumerated in table B. may in like manner be secured in the London dock warehouses. And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that

the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction; and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord HALE in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.[1]

LUMBARD *v.* STEARNS.

SUPREME COURT OF MASSACHUSETTS, 1849.

[4 *Cush.* 60.]

SHAW, C. J. This bill was originally brought by the plaintiff as an owner of mills on the lower part of Town brook, in Springfield, against the defendant Stearns, alleging that by means of an aqueduct, on his own land, he had diverted some portion of the water of two springs, being some of the sources of said brook, and thereby diminished the plaintiff's water power. Whilst this bill was pending and before answer filed, an act was passed by the legislature on the 10th of May, 1848, (*St.* 1848, *c.* 303,) entitled "An act to incorporate the Springfield Aqueduct Company."

This act authorized the taking of the springs before mentioned of Stearns, by purchase, and with certain other springs, the laying of an aqueduct for the purpose, expressed in the act, of supplying the village of Springfield with pure water. The act contains the provisions usual in such acts, for forming a company and raising a capital; for taking springs and lands, paying all damages; for digging up roads and ways; providing hydrants; for a gratuitous supply of water, in case of fire; a penalty for corrupting the water; and vesting certain superintending powers in the board of health of Springfield, and the county commissioners of Hampden, respectively. After the passage of this act, a

[1] GROSE, LE BLANC, and BAYLEY, JJ., delivered concurring opinions. — ED.

supplemental bill was filed, making the aqueduct company a party, and insisting on the same grounds against them, as stated in the original bill.

It is contended that this act is unconstitutional and void, because it in effect authorizes the corporation to take private rights of property for a use which is not a public one, and, therefore, not within the authority of the legislature, even though provision is therein made for a compensation for any such damage. It may be very questionable, whether the plaintiff, taking the use of the brook for a mill power, does not take it subject to the reasonable use of all proprietors above, in or near whose premises it passes, for domestic purposes, for such ordinary trades as require the use of water, such as tanning, bleaching, dyeing, and the like, and also for the extinguishment of fires. If such be the right of the inhabitants to the use of the water, it may be a question, whether it is a greater encroachment on the plaintiff's rights, to take water by conduits and hydrants, than by buckets and engines. But as this right may involve a question of fact, which this case has not reached, in its present stage, we lay no stress on this consideration, but merely suggest it in passing.

But we can perceive no ground, on which to sustain the argument, that this act does not declare a public use. It is so expressed in its title, and in the first enacting clause, and the entire act is conformable to this view. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing a supply to others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or nonfeasance, and the law has provided no other specific punishment for the breach, an indictment will lie. Perhaps also, in a suitable case, a process to revoke and annul the franchise might be maintained. But it is the less important to determine this question, because this charter is subject to the provision in the Rev. Sts. *c.* 44, § 23; by which it is competent for the legislature to make such alterations and amendments, as more effectually to carry into effect all the purposes of the act.

The court are of opinion that this act is not open to the objections made to it, and that it is not unconstitutional.

Bill dismissed.

PATERSON GAS LIGHT CO. *v.* BRADY.

SUPREME COURT OF NEW JERSEY, 1858.

[27 *N. J. L.* 245.]

ELMER, J. The question arises in this case, whether the Paterson Gas Light Company was bound, upon general principles, or as a duty imposed upon them by their charter, to furnish gas to all buildings on the lines of their main pipes, upon the applicants therefor agreeing to pay the fixed price, and to comply with such reasonable regulations as the company had established, as the court held in their charge, and as is assumed in the plaintiff's state of demand, and was insisted on in the argument before the court.

That no such duty arises out of the mere facts that the company made gas, laid pipes in the streets, and actually furnished it to many persons, may be safely assumed. Inn-keepers and common carriers are bound to receive all who properly apply to them, but this is a duty peculiar to them. I fully concur with what is said by Judge Bronson, delivering the opinion of the court in Wells *v.* Steam Nav. Co., 2 Comst. 209. "Other bailees and persons engaged in other employments are not, like common carriers and inn-keepers, bound to accept employment when offered; nor, like them, tied down to a reasonable reward for their services. They are at liberty to demand an unreasonable price before they will undertake any work or trust, or to reject employment altogether." And see Redfield on Railways, 293–94, and note.

But the court, in the charge, rested this duty on the terms of the act of incorporation. The language is, "they were incorporated with the special powers of their charter for the purpose of lighting the streets, buildings, manufactories, and other places in this city, not such particular streets, buildings, and mills as the caprice of their stockholders or officers may elect."

Upon looking into the charter, (Acts of 1825, p. 102,) it appears to be simply an act of incorporation, giving the company "power and authority to manufacture, make, and sell gas, for the purpose of lighting the streets, buildings, manufactories, and other places situate in the said town of Paterson," and for that purpose to purchase, take, and hold real estate, and to make contracts; provided, that the said real estate shall not exceed what may be absolutely necessary to effect the purposes of said company, and that no public or private land shall be dug into, or in any way injured or defaced, without permission being first obtained in writing from the owner or owners thereof. No monop-

oly or special privileges are granted, except that the company is entitled to recover double damages for any wilful injury done to the pipes or other works.

The state of demand does not assume, nor was it insisted on in the argument, that the charter imposes upon the company the duty of supplying gas to all the town, but only to persons having buildings on the line of their pipes. In my opinion it imposes no duty of either description, but simply empowers the incorporation to do what private individuals might have done without any charter. There is nothing in the act indicating any intention to impose any duty that would not have devolved on an individual erecting gas works; nor is there anything to prevent another company, or any individual who can obtain the permission of the city and owners of the land, from setting up a rival manufacture, and placing pipes alongside of those belonging to the company. Most of the acts incorporating gas companies do, what this does not, authorize the company, in express terms, to place their pipes in the public streets; but I am not aware that any of them impose the express duty of furnishing gas to all the persons demanding it, or to any of them. The Paterson company is authorized to make and sell gas, which, in the absence of any indication to the contrary, implies that they may fix their own price, and choose their own customers, like any other manufacturer. If the duty of furnishing gas to those requiring it was meant to be imposed, it would doubtless be expressed, and not be left to mere inference. If it is to be inferred, what is to be the limit? Why have not all the inhabitants of the town the same right to demand it as those having buildings on the streets along which the pipes are placed? The charter sets forth the general purpose of lighting all the streets and buildings, and the court below seems to have held that the company has no choice in the matter. But what company in the state, or elsewhere, could have ventured to assume such a responsibility as that?

The language of the charter is throughout permissive, and not compulsory. The company may organize, may make and sell gas or not, at their pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative, than to hold that other companies incorporated to carry on manufactures, or to do any other business, are bound to serve the public any further than they find it to be their interest to do so. It was earnestly insisted, on the argument, that the community have a great interest in the use of gas, and that companies set up to furnish it ought to be treated like inn-keepers and common carriers, and that, if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a strong presumption that there is no principle of law upon which it can be supported.

Had the plaintiff averred that the company had held out to the persons occupying buildings on the streets along which the pipes are laid, that it was ready to furnish gas to those providing the requisite fixtures and accepting the prescribed terms, and that he had done this, and that in consequence of a breach of a contract, thus or otherwise entered into, he had suffered damages, the case would have been very different. But this is not the nature of his claim. He claimed and has recovered damages and it would seem exemplary damages, simply on the ground that it was the duty of the company to furnish gas on the streets where the pipes are laid, to all persons demanding it, and offering to pay a reasonable price. Assuming this principle, it was left to the jury to say whether one of the rules of the company was reasonable. Being of opinion that the state of demand discloses no good cause of action, and that the court erred in the charge, I think the judgment must be reversed.

There is also another error in the proceedings. It appears that, before the hearing of the appeal, the court discharged the jurors in attendance from two townships, without drawing them, as required by the 28th section of the act relative to juries. Nix. Dig. 385. When the appeal was called, a jury was demanded, and the sheriff having returned a panel, the defendant below objected, and the objection being overruled, the jury was sworn. The correctness of this ruling can only be maintained by holding that when the sheriff returns a panel in the Court of Common Pleas for the trial of an appeal, as required by the 48th section of the small cause act, he is not required to draw them from the box, but may return a special panel. The act relative to juries, whether considered as contemporaneous with the small cause act, or as subsequent, according to its actual date, applies to all jury cases not specially excepted, and includes appeals. The language is unqualified, and any other construction would be inconvenient, if not impracticable. The uniform practice has been to draw jurors in such cases. To depart from this practice will be to introduce a needless exception from the general policy of the law, designed to secure an impartial jury.

POTTS, J., concurred.

LOUISVILLE, CINCINNATI & CHARLESTON RAILROAD COMPANY *v.* CHAPPELL.

COURT OF ERRORS OF SOUTH CAROLINA, 1838.

[*Rice*, 383.]

RICHARDSON, J. This court has weighed the argument so well presented on the part of the appellants, and appreciate its force.

The practical power confided to the railroad company by their charter, is great; and, from its very nature, such power might be abused or perverted, and landholders annoyed. Because the route of this great commercial way is, from necessity, left to the understanding, skill and discretion of the company; and their authority might be practically enforced, with too little consideration for individual justice, or human feelings. But, for any such abuse of power, the laws supply ample remedy. An independent jury is a refreshing sight and sure refuge in every instance, and is secured by the charter; and for continued abuse, or misuse, any charter may be repealed. But when the legislature have confided express power, it is not for this court to anticipate abuses and offer to restrain them, when our judicial province might be hereafter required in their supervision and correction. All powers, great and small, may be made oppressive. Yet, still, our necessities require them to exist in some tribunal.

If the railroad route had been given for a common highway, and surveyors named to locate its track through the entire State, and contractors hired to construct such road, with the emolument of toll gates, provided for compensation, the objections offered would be of similar character to those offered in the argument for the present defendants There would be no difference in principle or degree.

The true substantial difficulty felt by the court, is in coming to the conclusion that the railroad is to be put on the footing and character of a highway, and is erected, not for private, but for such general purposes, as to render it an institution for such public purposes. But, according to the view taken in the circuit decision, that the application of the eminent domain of government is, from its essential nature, very various; and to be made according to the successive exigencies of the State, it may be rationally assumed, that railroads, although of recent origin, have already become of incalculable public importance: That the enlarged ends and objects of this great railroad especially, is, for the transportation and intercourse, commercial and social, of several different States, whose interests are to be ever regarded, and the mutual confidence that belongs to such a work sacredly fulfilled. This characteristic is irreconcilable with the proper conception of a mere private way.

Again: Railroads have been recognized as highways in other States, with whose adjudications upon great subjects of commerce and reciprocal advantage, a liberal comity ought to be observed throughout the States: and the same great objects steadily kept in view by all who value railroads, a new moral cement of the American Union, as well as the useful vehicles of our vast and increasing internal commerce: and thus uniting in their natural operation pecuniary profit with moral fitness, and the politic establishment of so many independent States.

May not railroads, then, be fairly considered, in character and objects, (and ours more especially,) as international, and therefore public highways?

With such sentiments, and for such purposes, we are bound to consider the great ends of our own railroad system, and to inquire, under *their* guidance, whether the eminent domain of government may not be fairly and rationally applied for its advancement, in the very way pointed out by the present charter of the Louisville, Cincinnati and Charleston Railroad Company. In such an instance, we should especially require, that the charter shall be clearly unconstitutional, before we put it in the power of any one freeholder to arrest the progress of so great a work of usefulness and high considerations. It is not enough that the human mind may balance on the subject.

But take another point of view, which I cannot help thinking of lasting importance. Such a railroad as ours, should be held as a highway on account of its great objects: and for the same reasons, to be kept under public control. Is it not wise to hold such a company, as the guardians, or lessees, of a great highway, endowed with a public franchise: yet subject to the control which their purposes indicate as necessary and proper for such an establishment, and which the general right to use the road absolutely requires?

Such a road must be held as a part of the public domain, farmed out to individual men, for its practical administration and order alone — and if placed aloof from such control, it would inevitably become suspected of partiality, and odious to the people.

Since the argument before this court, our attention has been turned to the case of Beekman *v.* The Saratoga and Schenectady Railroad Company. It is found in Paige's Ch. Rep., 3 vol., 45, and is a learned decision of Chancellor Walworth, of New York. It will be satisfactory to the parties concerned in interest, to know, that the following points were ably discussed and decided in that case: 1. "Acts authorizing railroad companies to take private property, for the purposes of the road, upon paying full compensation, are constitutional." 2. "Railroads are public improvements; and the legislature can appropriate private property for such improvements, or authorize a corporation thus to appropriate it, upon full compensation to the owner." 3. "The public have an interest in the use of the railroad — and the company are liable to respond in damages if they refuse to transport an individual, or his property, without reasonable excuse, upon being paid the

proper rate of transportation." 4. "The legislature may regulate the use of the franchise, and limit the amount of tolls, unless they have deprived themselves of that power by the contract." 5. "It belongs to the legislature to decide, whether the public benefit is of sufficient importance to justify the exercise of the eminent domain in such cases." 6. "And the only restriction is, that private property cannot be taken without full compensation and in the mode prescribed."

Thus, then, the decision of this court concurs in every material respect, with those of other American judicatures, who have considered the great modern establishments of railroads. — And, it may be seen, that the manner of reasoning in each court has been drawn from the same great principles inherent in, and consecrated by the American constitutions. And thus, too, we have increasing evidence of our homogeneous principles — of their moral influence and sure fruits, in the harmony of opinions — and the consequent union in action, which engender reciprocal regard and tend so much to confirm the success of so many independent States, united together by such principles.

The appeal is dismissed on all the grounds taken.

EAST OMAHA STREET RAILWAY COMPANY *v.* GODOLA.

SUPREME COURT OF NEBRASKA, 1897.

[50 *Neb.* 906.[1]] 70 N.W. 491

POST, C. J. Complaint is made of the exclusion of evidence to prove that the defendant's line of road is constructed upon private property. The purpose of the evidence offered was, if we understand the position of counsel, to prove that the defendant company is not liable as a common carrier; but that proposition is not, it seems to us, entitled to serious consideration. The defendant, by undertaking to transport passengers for hire between Courtland Beach and the city of Omaha, assumed the relation toward its patrons of a common carrier, and the character of the easement in the right of way is wholly immaterial.

Affirmed.

[1] Only one point is printed. — ED.

EVERGREEN CEMETERY ASSOCIATION *v.* BEECHER.

SUPREME COURT OF CONNECTICUT, 1885.

[53 *Conn.* 551.[1]]

PARDEE, J. This is a complaint asking leave to take land for cemetery purposes by right of eminent domain. The case has been reserved for our advice.

The plaintiff is the owner of a cemetery, and desires to enlarge it by taking several adjoining pieces of land, each owned by a different person, and has made these owners joint defendants. Because of this joinder they demur. But we think that it is in harmony with our practice in analogous proceedings and with the spirit of the Practice Act, and that it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights. Each carries his own burden only; he is not made to carry that of any of his associates. Therefore the complaint, so far forth as this objection is concerned, is sufficient.

The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining, and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless, it remains a public use as long as all persons have the same measure of right for the same measure of money.

But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain.

[1] Opinion only is printed. — ED.

The complaint alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion.

Therefore the Superior Court is advised that for the reason that the complaint does not set out any right in the plaintiffs to acquire title to the land of the defendants otherwise than by their voluntary deed, the demurrer must be sustained.

In this opinion the other judges concurred.[1]

WEYMOUTH *v.* PENOBSCOT LOG DRIVING CO.

SUPREME COURT OF MAINE, 1880.

[71 *Me.* 29.[2]]

AN action on the case to recover damages of the defendant corporation for carelessly and negligently preventing the plaintiffs from seasonably delivering 751,290 feet of spruce logs, and 48,780 feet of pine logs, cut and hauled by them in the winter of 1872–3, on landings on the stream between Caribou lake and Chesuncook lake, at the outlet of Chesuncook lake, in consequence of which 600,000 feet of the plaintiff's logs were not driven to market in the year 1873, but were left behind in an exposed position, where many were lost, and there was a great shrinkage in quantity and quality.

The writ is dated December 8, 1877.

Plea, general issue.

The verdict was for plaintiff for $1,496.51, and the defendants move to set the same aside as against law, and against evidence and the weight of evidence. The defendants also allege exceptions to refusals of the presiding judge to give certain requested instructions.

DANFORTH, J. It is contended that this action is not maintainable, and the court was requested to instruct the jury that, "The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive, the corporation is to be paid."

It is claimed that this instruction is required by a fair construction of the terms of the charter.

It is unquestionably true, that when any doubt exists as to the meaning of any language used, it is to be interpreted in the light afforded by the connection in which it is used, the several provisions bearing upon

[1] *Compare:* Lumbard *v.* Stearns, 4 Cush. 60. — ED.

[2] This case is abridged. — ED.

the same subject matter, the general purpose to be accomplished, as well as the manner in which it is to be accomplished.

It is also true that when the terms of an act are free from obscurity, leaving no doubt as to the meaning of the legislature, no construction is allowed to give the law a different meaning, whatever may be the reasons therefor.

The first ground taken in support of the request, is that the defendant company is a "mutual association combined together for mutual benefit to aid each other in the accomplishment of a given object in which all are equally interested," and the inference drawn is, that each is equally responsible for the doings of all. This view is endeavored to be sustained by the alleged facts that "it is not a stock company, has no capital, no power to do anything for others than its own members, no permanent stockholders, no stock, and no provision for raising money to pay any charges or expenses except the expense of driving."

If these suggestions are found to be apparent from the provisions of the charter, they, or a portion of them, will be entitled to great weight, and might perhaps be considered conclusive. The most important of them are not so found. It may be that the charter was obtained for the mutual benefit of the log owners. Nevertheless, by its express terms it constitutes its members a corporation with all the rights, liabilities, and individuality attached to corporations of a similar nature. The first section provides that certain persons named, with their associates and successors, "are hereby made and constituted a body politic and corporate," and as such it may sue and be sued, prosecute and defend, may hold real and personal estate, not exceeding fifty thousand dollars at any one time, and may grant and vote money. Thus the charter gives all the attributes of a corporation and none of a simple association. It may not have stock, and if not, it can have no stockholders. But that is not necessary to a corporation, and does not constitute an element in any approved definition of it. If it has no stock, it may have a capital, and though it may assess only a certain amount upon the logs driven, the charter does not preclude money from being raised in other ways. Nor is the amount which may be assessed upon the logs driven limited to the expense of driving. The amendment of 1865 provides for a toll, not exceeding a certain amount, upon the logs driven "sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company."

Nor do we find any provision "that it may not do anything for others than its own members." By the charter it may drive all the logs and other timber to be driven down the west branch of the Penobscot river, while all owners of such logs may not be members of the company. It does not appear whether the first corporators were such owners or otherwise. In the charter we find no provision prescribing the qualification of the members. The by-laws provide, not that the member shall be an owner of logs to be driven, but he must be an "owner of timber lands or engaged in a particular lumbering operation on the west branch

of the Penobscot river, or its tributaries," and can then be a member only on application and receiving a majority of the votes of the members present. Hence the company may be acting for others, not members, while its members may not own a single log in the drive.

There is then no ground upon which this defendant can be held to be a mutual association, acting as a partnership for the benefit of its own members only, each bound by the acts of the others, but it must be held as a corporation acting as such, for the benefit of its own members, perhaps, but also for such other owners of logs as may not choose to become members, or may not possess the required qualification of "being a land owner, or a practical operator," or may not be able to get the requisite number of votes to make them such. It is a significant fact that in this case it does not appear that the plaintiff is a member of the defendant company, and until that does appear he cannot be subjected to the liabilities of one.

The fact that there is no specific provision for raising money to meet such a liability, as is here claimed, is immaterial. It cannot affect the plaintiff's right to a judgment. The liability of the log owners to be assessed, and its limits, are fixed by law, as also the purposes to which such assessments may be applied. Any recovery against the defendant will not change that law in the slightest degree. No assessment hereafter made can be increased to meet any contingency not contemplated by the charter, and if the plaintiff, after having obtained judgment, is unable to find means wherewith to satisfy it in accordance with the law, he will simply be in the condition of many other judgment creditors before him who have paid largely for that which affords them no benefit.

It is further contended that the action cannot be maintained, because, while the defendant under its charter has the right to drive all the logs to be driven, the obligation to do so is not imposed upon it. In other words, by the provision of the charter, it is left optional with the company to drive such as it may choose to do.

The language is, "and said company *may* drive all logs and other timber that may be in the west branch of the Penobscot river," &c., and it is contended that the word "may" must be construed as permissive and not as imperative. If any argument were needed to show that such is its proper construction, it would seem that the able and exhaustive discussion of this point by the counsel, would leave no room for doubt. The charter was granted as a privilege and not for the purpose of imposing an obligation, and when granted it has no binding effect until accepted by those for whom it was intended. But when accepted it becomes of binding force and must be taken with all its conditions and burdens, as well as its privileges. It cannot be accepted in part, but must be taken as a whole.

In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but "all" the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only

from all other corporations, but excludes the owner as well. If this exclusion was beyond the power of the legislature, it is not for this defendant to complain, for the right has been given to and accepted by it. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all,* or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do.

Motion and exceptions overruled.[1]

BRUSH ELECTRIC ILLUMINATING CO. *v.* CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY CO.

SUPREME COURT, NEW YORK, 1891.

[15 *N. Y. S.* 81.]

ACTION by the Brush Electric Illuminating Company against the Consolidated Telegraph and Electrical Subway Company. Plaintiff moves for an injunction.

INGRAHAM, J. The judgment demanded by plaintiff in this action is that the defendant, its officers, agents, and servants, and all others having notice, be perpetually enjoined and restrained from removing, cutting out, or in any manner whatsoever interfering with the cables and conductors or the property of the plaintiff, and from interfering with the plaintiff, or its officers, agents, and servants, in operating or maintaining the said cables and conductors, and in having access to them or any of the plaintiff's property in the subways of the defendant, or elsewhere, and that this court determine and adjudge what would be a just and reasonable rental for the use of the ducts and subways by the plaintiff and the terms upon which such rentals must be paid, and that defendant be enjoined from committing any of said acts during the pendency of the action. An inspection of the complaint shows that the theory upon which the plaintiff brought the action was that in some way this court had power to fix what, in its judgment, would be a reasonable rental for the plaintiff to pay for the use of the ducts occupied by it. It seems to me clear that this court has no such power to fix or determine what rental plaintiff should pay, or what would be a reasonable compensation to be paid by plaintiff, for its use of the subways. The defendant has constructed these subways in pursuance of two contracts, known as the contracts of July, 1886, and of April, 1887. The

[1] *Compare:* Mann *v.* Log Co., 46 Mich. 38. — ED.

contract of April, 1887, was, in terms, a modification of the contract of 1886, and under its provisions the defendants were authorized to build, equip, maintain, and operate the subways in the contract mentioned and referred to. The defendant, by the contract, agreed that spaces in said subways shall be leased by the parties of the first part (the board of electrical subways) to any company or corporation having lawful power to operate electrical subways in the streets in the city of New York that may apply for the same. It does not appear, however, that the board have ever acted under this authority. The contract, however, further provides that the party of the second part (this defendant) may fix a fair scale of rent to be charged, but the scale of rents or any charges fixed or made by defendant shall at all times be subject to the control, modification, and revision by the board of electrical control, and that no contract shall be made between the party of the second part (the defendant) and any company or corporation on any terms which shall not require the payment by such other companies or corporations of rents at the rates so fixed. This contract was expressly ratified by chapter 716, Laws, 1887, and it must control the right of the defendant to the use of the subways constructed by the defendant. It will be seen that the provisions of this contract gave to the defendant in the first instance the authority to fix a uniform rate to be paid by all persons occupying its subways. That rate must be a fair one, but the corporation is to say, in the first instance, what is a fair charge for the use of the subway; and it is clear that until the rate fixed is modified by the board of electrical control, who are the successors of the commissioners of the electrical subways, the rate so fixed must be paid by all persons using the subways. It is thus left to the commissioners to determine whether or not the rate fixed by the defendant is a fair and reasonable rate, and this court is given no power to review the exercise of that discretion; and since the commencement of this action the board of electrical control has passed upon the question, and fixed the rent that the plaintiff is to pay for the use of the subways. I think, therefore, that the court cannot determine what would be a just and reasonable rental for the use of the subways by plaintiff. Nothing in section 7 of the act of 1887 would justify the court in reviewing the action of the board of electrical control, for it was the evident intent of that section to give to the court power by *mandamus* to compel the defendant to comply with its contract, and furnish just and equal facilities to corporations applying for the use of the subways, not to fix the rent that was to be paid, which was, by the express terms of the contract, to be fixed by defendant, subject to the review of the board, and the rate thus fixed must be paid by each corporation using the subways.

Nor do I think that the plaintiff would be entitled to an injunction restraining the defendant from removing, cutting out, or in any manner interfering with the cables and conductors of the plaintiff. The exact relation that exists between plaintiff and defendant is not easy to determine. The defendant being the owner of these subways, or ducts,

built under the surface of the streets in the city of New York, the plaintiff being desirous of using such subways for its wires or cables with which to supply electricity to its customers, presented to the defendant an instrument in writing whereby application was made for space in the electrical subway (specifying the street or avenue) for the term of one year, to be used for electrical light and power purposes. In some of these applications the rate or rental was fixed at $1,000 per duct per mile per annum; in other applications the amount of rent was not mentioned. The rates fixed by defendant had, however, been communicated to the plaintiff prior to making of the applications in question. No agreement or contract of any kind appears to have been signed by defendant, nor did it agree to allow the plaintiff to continue to use the duct or subway for any specified term. At most it was an acceptance of the application, and a verbal permission to use the duct for the purpose mentioned. So far as the plaintiff can claim under any grant or contract made by defendant, this would constitute a mere license to the plaintiff to use the subway or duct for the period mentioned. By such license the plaintiff acquired no interest in the subway, and, under the contractual relations between the parties, the defendant was, I think, entitled to revoke the license at any time, and upon the revocation of the license all rights of the plaintiff in the subway ceased. The distinction between a license and an easement is stated in Wiseman *v.* Lucksinger, 84 N. Y. 42, and I think, under the rule there laid down, this permission to use these ducts could be nothing more than a license, and revokable at the pleasure of the licensor.

The plaintiff, however, claims that the defendant is a *quasi* public corporation, and has only such rights as are given to it by charter, and, as it is nowhere expressly given the right to withdraw the plaintiff's wires from its ducts, when they are once there it must allow them to remain there forever; and the only remedy that the defendant has against the plaintiff, or any one using its ducts, is an action at law for the recovery of the rent reserved. It has been held, however, that this principle has reference to remedies or processes of a judicial nature only, and does not affect the right of a person to do such material acts as are necessary to protect his rights. Jordan, etc. Co. *v.* Morley, 23 N. Y. 554. But the statutes and contracts in question conferred upon defendant no remedy in case of the refusal of a person using its subways to pay the rate fixed, and I can see no reason why it should not have the same rights that any other person would have under similar circumstances. It seems to me, however, that this position arises out of a misconception of the defendant's real position. The defendant is not a common carrier, nor has it received from the State a franchise such as is conferred upon a ferry company or a turnpike road. Defendant, it is true, obtained permission from the public authorities to build these subways in the public streets, and it has bound itself by contract to furnish to such corporations or individuals as have authority to use the public streets for electrical purposes the use of its

subways, but such obligation rests entirely upon its contract under which it received its authority to build its subways. Irrespective of that contract, and section 7 of the Acts of 1887, the plaintiff would have no right, against the will of the defendant, to use its subways, nor would the public authorities, nor the courts, have power to compel the defendant to give any rights to the plaintiff. Whatever right, therefore, the plaintiff acquired, it is under the contract under which the defendant had authority to build the subways, and the statutes under which such contract was made, and there can be nothing found in these statutes or contract that would justify the claim of the plaintiff. On the contrary, the utmost care is taken to provide for the payment of compensation to the defendant for the use of the subways, and defendant is expressly prevented from giving any one the right to use them, except upon the payment of the rate fixed; and to say that a corporation getting permission to use the subways upon an agreement to pay the rate fixed for its use, under the provisions of the statute, could, by simply refusing to pay, defeat the express provisions of the contract by using the subway without paying for it the rate fixed or paying a less rate, would subvert the whole scheme under which the subways have been built.

The conduct of the plaintiff has not been such as to commend it to the favorable consideration of a court of equity. Although well knowing the rates fixed by defendant for the use of its subways, and where in the application the amount of rent is stated, no application was made to the board of electrical control to review the action of the defendant in fixing the rent, nor did the plaintiff pay or tender to the defendant any sum as compensation for the use of the subway by it. It simply held on to the subway, paying nothing for its use until the defendant threatened to revoke the permission given to use the subway, and then, without paying or offering to pay to the defendant anything, it applies to the court for an injunction, under which it could continue to use the subways indefinitely, without paying anything for the right it enjoys. Under such circumstances, it would require a clear case, and one free from doubt, to justify the interference of the court. I have examined carefully the elaborate arguments submitted on behalf of the plaintiff, and, while it has been impracticable to notice all of the points made, I have come to the conclusion that upon no ground can the plaintiff be entitled to any relief in this action. The motion for injunction must therefore be denied, and temporary injunction vacated.

JOHNSTON'S APPÉAL.

SUPREME COURT OF PENNSYLVANIA, 1886.

[7 *Atl.* 167.]

APPEAL of Henry M. Johnston from decree of common pleas No. 2, Allegheny county, dismissing his bill in equity filed against the People's Natural Gas Company and others.

PER CURIAM. It is a curious objection to set up against the act of May 29, 1885, in view of the present consumption of natural gas, that its use is not a public one, and that, therefore, those corporations which are engaged in its transportation may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found, not in the transportation, but in the use of that fluid after it has, by these agencies, been transported. Nor would it seem to us as of the slightest materiality that the water thus produced had been drawn from a single spring, well, or basin. Just so with natural gas. It has become a public necessity; but, as it cannot be used except it be piped to the manufactories and residences of the people, it follows that, as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public, and directly affect its welfare.

The decree of the court below is affirmed, and the appeal dismissed, at the costs of the appellant.

STATE *v.* EDWARDS.

SUPREME COURT OF MAINE, 1893.

[86 *Me.* 102.]

HASKELL, J. The defendants were convicted under R. S., c. 57, §§ 5 and 6, as amended by the Act of 1885, c. 332, on two several counts; first, of refusing to receive grain at their grist-mill there tendered to be ground; second, of taking excessive toll. The defendants have exception to the ruling of the court that they were bound to receive the grists of grain offered, and grind the same for the toll specified by the statute, and that an agreement for toll in excess of that fixed by statute would be no defence.

The case does not show what kind of a mill the defendants operated, nor whether it was a public or private mill, nor whether it was a water-mill, steam-mill or wind-mill. It assumes, however, that it was a grist-mill, used for grinding grain for the public.

Exceptions must show sufficient facts to make the ruling erroneous. Reed *v.* Reed, 70 Maine, 504. In this case, therefore, if the ruling excepted to be correct, and the statute under which the conviction was had be constitutional when applied to any kind of a grist-mill, judgment must be entered on the verdict. And it may be assumed that defendants' mill was a public grist-mill, propelled by a head of water obtained under authority of the mill act, R. S., c. 92.

Assuming the mill to be a public mill, and the statute under which the conviction was had to be valid, an agreement between the owner of the grain and the defendants, for toll in excess of the statute quantity, can be no defence. The act of the defendants in taking excessive toll was just as much in defiance and violation of the statute, when taken by agreement with the owner of the grist, as if taken without his consent. The defendants' act is prohibited by the statute. They were required to run their public mill for statute toll, with equal dispatch for all the patrons of their mill. They were required to receive grists and grind them in their turn, without motive for unequal dispatch to those willing to pay an extra price for it. The taking of usury by agreement with the borrower of money is analogous. Freedom from blame on the part of the lender is not a bar to the borrower's right to recover back the usury. Houghton *v.* Stowell, 28 Maine, 215. The statute under which the conviction was had imposes no such condition.

But it is stoutly asserted that the statute is unconstitutional as an invasion of the private right of enjoyment of property. The mill act of Maine applies to all water-mills; and whether its validity results from the exercise of eminent domain, as supposed by many cases, Jordan *v.* Woodard, 40 Maine, 317; Great Falls Mfg. Co. *v.* Fernald, 47 N. H.

444; Olmstead *v.* Camp, 33 Conn. 532, and others cited by Gould on Waters, § 253, and by the Supreme Court in Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, or from the proper regulation of the rights of riparian owners, so as to best serve the public welfare, having due regard to the interests of all, as held in Head *v.* the Amoskeag Mfg. Co. *supra,* and in Murdock *v.* Stickney, 8 Cush. 114, and remarked by the Court in Lowell *v.* Boston, 111 Mass. 466, it is unnecessary now to consider.

It is conceded by all authorities that the public use of property by the individual is within the scope of legislative control. And it matters not whether the use be authorized by express statute or dedicated by the individual proprietor. If it be a public use, it is within the supervision and control of the legislature. The troublesome question is, whether the use be public. Tyler *v.* Beacher, 44 Vt. 648. In most branches of business the public has an interest. That interest varies according to the surrounding conditions of the particular business in question. If it be a monopoly, the interest of the public to be fairly and conveniently served is much greater than when the monopoly ends by force of wholesome competition. A distinction must be made between a public use and a use in which the public has an interest. In the former case, the public may control, because it is a use within the function of government to establish and maintain. In the latter case, it is a private enterprise that serves the public and in which it is interested to the extent of its necessities and convenience. The former is clearly within the control of the legislature, while the latter may not be. Many authorities, however, go to that extent. Munn *v.* Illinois, 94 U. S. 113; Budd *v.* New York, 143 U. S. 517, and cases cited. The public is interested to be well and reasonably served at the store of the tradesman, the shop of the mechanic and the office of the professional man, and yet, all these vocations are private. The goods on sale in the store, material furnished by the mechanic, and the skill employed by the professional man are the individual property of each one respectively. Their vocations are exercised for their own gain, and they have a right to the fruits of their own industry without legislative control. It must not be understood that each one may not be properly subjected to suitable police regulations as to the manner of his business; 2 Kent, 340; but the business cannot be thereby controlled and the profits to be gained therefrom destroyed, taken away or limited by the establishment of prices; otherwise we should have a paternal government that might crush out all individual liberty, and the declaration of our constitution would become as valueless as stubble.

It is conceded by all authorities that common carriers, common ferries, common roads, common wharves, common telegraphs and common telephones, etc., and common grist-mills and common lumber mills are of that public nature to be put under public control, whether operated under the authority of charters from the state, or by individual enterprise. Each of those cases is within the function of

government to establish and maintain, and, therefore, to control, by whomsoever exercised. Blair *v.* Cuming County, 111 U. S. 363; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9; Stone *v.* Farmer's Loan and Trust Co., 116 U. S. 307; Chicago, Milwaukee & St. Paul Ry. Co. *v.* Minnesota, 134 U. S. 418.

Mills for the grinding of grain and for the sawing of lumber for all comers have been aided or established by the legislature from the earliest colonial times. Those mills were usually water-mills; but it is of no moment what the propelling power may be. Burlington *v.* Beasley, 94 U. S. 310. They have always been considered so necessary for the existence of the community that it was proper for government to foster or maintain them; and in the absence of government aid, the individual proprietor, not pretending to serve the public, might maintain such mills as private mills, free from legislative interference, precisely as he might maintain a store, shop, or other private business; but when such proprietor makes his mill public, assumes to serve the public, then he dedicates his mill to public use and it becomes a public mill, subject to public regulation and control. He is not compelled to continue such public use, but so long as he does, he becomes a public servant and may be regulated by the public.

In the present case, the mill must be considered a public mill and rightfully within legislative control. No suggestion is made that the statute regulation is unreasonable, and therefore it is unimportant to consider whether the reasonableness of the statute regulation be a legislative or judicial function. *Exceptions overruled.*

SAMMONS *v.* KEARNEY POWER & IRRIGATION COMPANY.

SUPREME COURT OF NEBRASKA, 1906.

[110 *N. W.* 308.[1]]

THIS brings us to the intervener's cross-appeal. Its contract for the use of water contains this clause: "The party of the first part further agrees not to sell water for power to any person or corporation, intending to compete with the party of the second part (intervener) in the generation of electricity for sale." The trial court held the foregoing clause to be contrary to public policy and void, and the intervener contends that the decree to that extent is erroneous. In support of this contention many cases are cited wherein exclusive franchises to operate ferries, to construct bridges, or to supply cities with water or gas for a limited time have been upheld. See New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; New Orleans Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; Louisville Gas Co. *v.* Citizens' Gas. Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1, 10 Atl. 170; Des Moines Street R.R. Co. *v.* Des Moines Broad Gauge Street Ry. Co., 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602; Davenport Electric Light Co. *v.* City of Davenport, 124 Iowa, 22, 98 N. W. 892; Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 17 L. Ed. 571; The Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137. The distinction between these cases and the case at bar is obvious. A municipal corporation is an instrumentality of the state for the better administration of government in matters of local concern. United States *v.* New Orleans, 98 U. S. 381, 20 L. Ed. 434. The main purpose of its creation is the exercise of certain governmental functions within a defined area. While it has the power to make contracts and transact other business not strictly governmental in character, such powers are incidental or auxiliary to its main purpose. In none of the cases cited was there any attempt on the part of a municipality to restrict its governmental functions, or to place itself in a position where it would be incapable of carrying out the purpose for which it was created.

In the case at bar we are dealing with an irrigation company — a *quasi* public corporation. It is also a governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity it is bound to furnish water from its canal to persons desiring to use it on equal terms and without discrimination. In this

[1] Only that part of the case which relates to the intervener's appeal is printed. — ED.

respect it stands on the same footing as a railroad company. Neither has the right nor the power to place itself in a position where it cannot serve every person on equal terms with every other person. Neither has the right nor power to bind itself by a contract which, if enforced, would render it unable to serve the public on those terms or to carry out its main purpose. In State *v.* Hartford, etc., R.R. Co., 29 Conn. 538, where a railroad company had placed itself in such position, ELLSWORTH, J., pertinently asks: "What right had it to covenant it would not run its cars to tidewater, as its charter prescribes and the public accommodation requires?" And with equal force it may be asked in this case: What right had the irrigation company, bound by the very nature of its organization to furnish water to the public without discrimination, to bind itself by the clause in question, which would prevent it performing such services? In Chicago Gaslight Co. *v.* People's Gaslight Co., 121 Ill. 530, 13 N. E. 169, 1 Am. St. Rep. 124, one of the propositions of law laid down is that a corporation, owing a duty to the public, cannot make a valid contract not to discharge such duty. From this proposition it would necessarily follow that, where a corporation owes a duty to the public generally, it cannot bind itself by contract to serve one person to the exclusion of all others.

In West Virginia Transportation Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527, a landowner had granted to an oil transportation company the exclusive right of way and privilege of laying and maintaining pipes for transporting oil through a tract of 2,000 acres, and the contract was held invalid, as an unreasonable restraint of trade and contrary to public policy. In that case a large number of authorities are reviewed, among which are many wherein contracts in restraint of trade have been upheld, and others, again, where they have been held void as against public policy. The court there holds that the test is whether the restraint is prejudicial to the public interest, and then uses this language: "From the principles which underlie all the cases the inference must be necessarily drawn that, if there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest. Are there any sorts of business of this peculiar character? It seems to me that there are, and that they have been recognized as possessing this peculiar character, both by the statute law and by the decisions of the court. Are not railroading and telegraphing forms of business which are now universally recognized as possessing this peculiar character?" The principle involved in the case at bar does not, as it appears to us, differ from that involved in the case from which we have just quoted. The business of the irrigation company is of the peculiar character

mentioned by the West Virginia court. In the latter there was an attempt to give one person engaged in transporting oil an exclusive right to occupy certain lands for that purpose, to the exclusion of all others who under the laws of that state had an equal right to use the land after proper condemnation proceedings for the same purpose. Here there was an attempt to give the intervener an exclusive right for a term of years to use water which under the law the irrigation company was bound to furnish to the public on equal terms, and the one, no less than the other, is contrary to public policy and illegal.

But the intervener takes the position that the question of the validity of that clause of the contract is not involved in this case, and, consequently, that the determination thereof by the trial court is error. This position is clearly untenable. The intervener came into court asserting the priority of its rights under its contract with the mortgagor. Such contract, or lease, is in the nature of a prior incumbrance, and it was eminently proper for the court to ascertain and determine the nature and extent of such incumbrance. The position of the intervener is analogous to that of a first mortgagee, who appears in a case, asserting the priority of his lien, but not asking its foreclosure. In such cases the propriety of finding the amount due on the first mortgage and ordering a sale subject thereto has never been questioned. Whether the intervener, because of the public service required of it by its contract with the city of Kearney, would be entitled to a preference over those using water for private purposes, is a question that does not arise at this time; and, when it does, if it ever does, we apprehend it will turn on questions of public policy, rather than the contractual rights of the parties.

Other questions are presented by the cross-appeal; but, in the view we have taken of the case, they are not such as affected the rights of the intervener. Consequently they will not be considered.

It is recommended that the decree of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

PER CURIAM. For the reason stated in the foregoing opinion, the decree of the district court is affirmed.

CINCINNATI, HAMILTON AND DAYTON RAILROAD CO., *v.* VILLAGE OF BOWLING GREEN.

SUPREME COURT OF OHIO, 1879.

[57 *Oh. St.* 336.[1]]

ERROR to the Circuit Court of Wood County.

This action was brought in the Court of Common Pleas of Wood county, by the village of Bowling Green, to recover of the railroad company, plaintiff in error, a sum of money to reimburse the village for expenditures incurred by it in maintaining electric lights at certain places that by ordinance it had required the railroad company to maintain, and which the latter had neglected to do.

The village prevailed in the Court of Common Pleas, and the judgment there rendered in its favor was affirmed by the Circuit Court. To reverse the judgments thus rendered is the object of the proceedings in this court.

BRADBURY, J. . . . The ordinance in question specifies the points at which lights are to be maintained, and prescribes the kind of light, and the lamps and attachments to be employed. Electricity must be used, and the lamps and attachments must be in all respects similar to those used in lighting the streets of the village.

Plaintiff in error contends, that these provisions are unreasonable at the [point] of the power of determining the kind of light to be used, and of contracting on its own behalf; that the system of lamps and attachments which the ordinance prescribes are the subject of patents, and that the exclusive right to use them within the village, has been granted to the Bowling Green Electric Light and Power Company, and that, therefore, the plaintiff in error was put wholly within the power of such company by the ordinance, and will be compelled to pay whatever price the company chooses to establish or charge for the lights required.

[1] This case is abridged. — ED.

As respects the objection to the ordinance on account of its specifying the kind of light to be used, the statute — section 2495, Revised Statutes — among other provisions, requires the ordinance to "specify the manner in which such . . . railway shall be lighted." . . . This language seems broad enough to authorize the municipality to prescribe the kind of light to be employed for that purpose, — whether electricity, gas, or any other material or means that may be reasonably adapted to the purpose. The power of selecting the kind of light to be used can be exercised, of course, only where more than one kind is available. This power must reside somewhere, either in the railroad company or the municipality. The power to require the lighting of a railroad track is a branch of the police power of the State. If the terms of this section (2495) of the Revised Statutes, granting the power to municipal bodies should not be broad enough to expressly authorize them to prescribe the kind of light to be employed, yet, as the power to compel a railroad company to light its track at all, implies authority to require it to be efficiently done, it would seem to necessarily follow that, within reasonable limits, the power to prescribe the kind of lights rests with the municipal authorities. They, of course, in this respect could not cast an unreasonable burden on the railroad company.

Doubtless, an ordinance would cast upon a railroad company an unreasonable burden, and for that reason, would be void, if it prescribed an electric light, when the municipality contained no electric plant or other convenient means of generating electricity; otherwise, each municipality, large or small, through which a railroad might pass, could compel those who operate the road to erect a plant to generate the light thus required.

There was, however, in the village of Bowling Green, at the time the ordinance under consideration was passed, an electric light and power company, operating an electric plant, and therefore the means was at hand that would enable the railroad company to comply with requirements of the ordinance in this respect, and, therefore, such requirement was not in itself unreasonable.

Did the ordinance unreasonably limit the right of the railroad company to contract on its own behalf, or unreasonably place it within the power, and subject it to extortion at the hands of the electric light and power company, of which it must procure the lights ?

True, the railroad was required to adopt electricity as the means of illumination, and was confined to the kind of lamps and their attachment, then in use in said village. If the exclusive right to use within the village these lamps and attachments had been granted by the patentee to the Bowling Green Electric Light and Power Company, and if this company had an absolute power to fix the price that it could exact for the use of its light and lamps, then the contention of the railroad company would find strong support in reason and justice. It may be conceded, however, that the lamps and their attachments, as well as the system of lighting in use in the village of Bowling Green, were

all protected by patents, and that the Bowling Green Electric Light and Power Co. had the exclusive right to their use within that village, and yet the power of extortion would not follow, necessarily.

The light and power company have acquired in the village rights that are in the nature of a monopoly. The use to which it has devoted its property is one in which the public have an interest, and it requires the use of the streets and alleys of the village to conduct and distribute electricity to its lamps for illuminating purposes; and, in addition to this, power to appropriate private property has been conferred on it. Section 3471, Revised Statutes. Both reason and authority deny to a corporation clothed with such rights and powers, and bearing such relation to the public, the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. Beach on Corporations, sections 834, 835, 836; Zanesville *v.* Gas Light Co., 47 Oh. St. 1; Munn *v.* Illinois, 94 U. S. 113; Spring Valley Water Works *v.* Schottler *et al.*, 110 U. S. 347; Gibbs *v.* Baltimore Gas Co., 130 U. S. 408; The City of St. Louis *v.* The Bell Telephone Co., 96 Mo. 623; Nebraska *v.* The Nebraska Telephone Co., 17 Neb. 126; Central Union Telephone Co. *v.* Bradbury, 106 Ind. 1.

The Bowling Green Electric Light and Power Company was bound to serve all of its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted off others who had used its lights. The village had authority to fix the rates to be charged by the company for lights. Section 2478, Revised Statutes. If the village authorities should fail to act in this respect, and the plaintiff in error and the power and light company could not agree upon a price, the latter, by an appeal to the courts of the State could compel the former to furnish the lights at a reasonable price.

Therefore, the provisions of the ordinance requiring the plaintiff in error to use the lamps and attachments then in use in the village was not unreasonable. Notwithstanding that the sole right to use the lamps and attachments prescribed may have been vested in the Bowling Green Electric Light and Power Co., yet, as that company was bound to furnish light to all its patrons on terms that must be both reasonable and impartial, the ordinance requiring the use of such lamps and attachments should, in that respect, be deemed reasonable. The right to make contracts on its own behalf is doubtless a valuable one to the plaintiff in error, and if there had been two or more electric light plants in the village, an attempt to dictate to plaintiff in error which of them it should choose might have presented an interesting question. There was but one, however, and the only choice open to plaintiff in error, was between building a new plant or taking light of the company then established in the village. If that company had an exclusive right to use the lamps and attachments prescribed, then no choice was open to the plaintiff in error, and it would be compelled to procure the lights of that company. This, however, from a practical point of view, was of little or no concern, because, while the circum-

stances surrounding the plaintiff in error compelled it to take the lights of this particular company, yet the latter was also compelled to furnish them at a reasonable price. The State, under these circumstances, must yield its police power, a power existing for the benefit of all its citizens, or the right of a railroad company to an unlimited power of contracting must give way. This is not the only instance in which its powers in this respect are curtailed for the public good. This is notably the case in respect of its power to contract concerning the transportation of freight and passengers.

The ordinance in question requires the lights to be furnished by the plaintiff in error, shall be kept lighted during the same hours that the street lamps of the village may be kept lighted; this we think is sufficiently definite to clearly inform the plaintiff in error of what was required of it in this respect.

The ordinance, we think, imposes no unreasonable burdens on the plaintiff in error. *Judgment affirmed.*

JONES v. NORTH GEORGIA ELECTRIC COMPANY.

SUPREME COURT OF GEORGIA, 1906.

[125 *Ga.* 618.]

ATKINSON, J. The right of the court to refuse to grant the injunction depends upon the constitutionality of the act of 1897 (Acts 1897, p. 68). The act is called into question upon one ground only, that is to say, it is challenged as being violative of that clause, found substantially identical in the constitution of this State and in the constitution of the United States, which guarantees that "No person shall be deprived of life, liberty, or property, except by due process of law." It is insisted that the act violates that provision of the two constitutions for a single reason, namely, that it is an attempt to authorize individuals to exercise the State's right of eminent domain for other than public purposes. If this contention is well founded, it is manifest that the act would be unconstitutional, because it is elementary that the State's right of eminent domain can never be exercised for other than such purposes. Our State constitution provides that the right of eminent domain shall never be abridged. Constitution, art. 4, sec. 2, par. 2 (Civil Code, § 5788). It is settled law that the State may primarily exercise the right for any public purpose, but there is no limitation which prevents the State by legislation from delegating to others the authority to exercise its right of eminent domain for any public use or purpose. The right of eminent domain is inherent in the State, but lies dormant until quickened into activity by appropriate legislation. See United States *v.* Jones, 109 U. S. 513; Hand Gold Mining Co. *v.*

Parker, 59 Ga. 423; Cooley's Const. Lim. (7th ed.), 759. In the Hand Gold Mining Co. case, *supra*, it is said: "The right of eminent domain may be exercised by the General Assembly in this State when it is for the public good, either through the officers of the State or through the medium of corporate bodies or by means of individual enterprise." See also Hopkins *v.* Fla. Cen. R. Co., 97 Ga. 107; Mims *v.* Macon & Western R. Co., 3 Ga. 338. Thus we see it is not so much the character of the person exercising the right as the uses to which the object is to be applied. See also, in this connection, Chestatees Pyrites Co. *v.* Cavenders Creek Gold Mining Co., 119 Ga. 354. It is the State's right always, and in the discretion of the legislature as to whom authority to exercise it shall be delegated, but the character of the purposes for which the power shall be exercised is altogether a different question. The legislative discretion in granting the right is confined to uses of public necessity. In no case can the legislature authorize the State's right of eminent domain to be employed for a purely private purpose. The announcement just made needs no argument in its support; it follows from the fundamental law which forbids the taking of private property except for public purposes. "The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. 'The right of eminent domain,' it has been said, 'does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer." Cooley's Const. Lim. (7th ed.), 763.

We now come straight to the inquiry as to whether this act attempts, under guise of the law of eminent domain, to authorize a taking of property from an owner against his will for other than a public purpose. Judge COOLEY declares, that "We find ourselves somewhat at sea, however, when we undertake to define, in the light of judicial decisions, what constitutes a public use," and, after consideration of able opinions on the subject, evolves the following general rule for the ascertainment of the character of the use: "The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty — perhaps impossibility — of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide." Cooley's Const. Lim. (7th ed.), 766-769. In applying this general rule, we must bear in mind that "public necessity" and "public convenience" and "public welfare" are to be accommodated under so many different conditions that there can be no definite

and fixed state of facts which will invariably determine the character of the use. The most that can be done is to recognize the general rule that the subserving of public necessity or public convenience or public welfare under conditions which render the State's intervention necessary is a condition precedent to the exercise by an individual of the State's right of eminent domain, and let each case as it arises under its particular attendant conditions be determined by that rule. See Clark v. Nash, 198 U. S. 361. The constant change of conditions accounts in a large measure for the great conflict in judicial expression upon the subject. In fact there are hardly two cases alike, and there is of necessity a diversity in the decisions upon the subject; but underlying nearly the entire current of precedent may be seen a faithful adherence to the general rule which has been quoted. Applying the rule to this particular case, it seems manifest that the public necessity and public convenience and public welfare are to be subserved, and that for the accomplishment of these purposes it is necessary and proper for the State to make suitable provision, by the delegation of authority, to condemn such property as may be needful for carrying those purposes into execution. By the terms of the act one of its direct purposes is to call into use the great water-powers of this State, in order to accommodate the necessities of the people. The present conditions are such that, under modern appliances, this result can be accomplished in no way except that which is proposed. It involves the problem of creating light, heat, and power at a remote point, for delivery by transmission over wires to the consuming public in neighboring and distant districts and cities, thus becoming necessary to pass over the lands of others. Thus we see the public purpose is twofold; for it has the object, first, to develop the resources of the State by bringing its great water-powers from a condition of waste to one of profitable employment; and, second, to supply the demands and necessities of the public with light, heat, and power. There are many respectable authorities that hold that the right of eminent domain may be exercised wherever the public interest will be subserved, when directed to purposes tending to the development of the natural resources of the State, or tending to the accommodation of the public welfare and convenience; and it seems to us that when the legislature saw the opportunity of directing the attention of science, industry, and art to the water-powers of the State, with a view to supplying our people with such utilities as light, heat, and power for the promotion of our domestic and industrial welfare, its action in lending the State's aid to the end of affording the necessary right of way over the private lands of individuals was fully justified under the law which permits the taking of private property for public uses. We do not mean to say that a use which only remotely tends to the public good or convenience will justify the exercise of the State's right of eminent domain. Such a position would lead to unreasonable results, for there is scarcely an industrial enterprise which has not the

features of public benefit; but such is not the case which we now have under consideration. Here is the direct benefit to the State in developing its natural resources, and here are the resulting uses to the public which are so direct and far-reaching as to extend to every industrial enterprise and to the home of every individual. We are safe in holding that under the conditions of this day and time, the legislature did not unconstitutionally exercise its power in passing the act now under review. This act is only directed to a coercion of those who will not for the common good submit their property to the right of passage. It provides just compensation to them, but authorizes compulsory submission to the interests and welfare of the State and the good of the public. It may be noted that the pretension of the act is to go no further than to provide for the acquisition of an easement over the land of another, which is authorized to be enjoyed only for a public use. Indeed, the constitution prohibits any further taking of the owner's property without his consent, and it must follow that any use of the property for a purely private purpose would not fall within the pale of the act. Such private use, if any should be attempted, could not be justified under the act, and would be a trespass as against the owner. The possibility of a use which is not authorized by the act could not serve to render unconstitutional those provisions of the act which are the real object of the legislation and which are themselves consitutional. It is readily seen that one of the essential and constituent obligations upon the part of the individual who attempts to exercise the right of eminent domain under this act is that he shall serve all of the public fairly and without discrimination. Without such public service, his right would have no sanction under the act. The conclusion just announced follows as a matter of logic from a consideration of the case at bar, and is well supported by authority. See, in this connection, Central Union Telephone Co. *v.* Bradbury, 106 Ind. 1; State *ex rel.* Webster *v.* Telephone Co., 17 Neb. 126; Zanesville *v.* Gaslight Co., 47 Ohio St. 1; Griffin *v.* Goldsboro Water Co., 122 N. C. 206; City of St. Louis *v.* Bell Telephone Co., 96 Mo. 623; Spring Valley Waterworks *v.* Schottler, 110 U. S. 347; Gibbs *v.* Consolidated Gas Co., 130 U. S. 408; Munn *v.* Ill., 94 U. S. 113; Snell *v.* Clinton Electric Co., 89 Am. St. R. 341; Cincinnati, H. & D. R. Co. *v* Bowling Green, 57 Ohio St. 336; 2 Beach on Priv. Corp., §§ 834-836. Under the particular conditions then existing, this court in Loughbridge *v.* Harris, 42. Ga. 500, said: "We do not think a mill, although it has some of the attributes of public use and is regulated by law for certain defined purposes, can be regarded such public use as the constitution recognizes, to authorize the exercise of this great constitutional power." Afterwards, in the case of Hand Gold Mining Co. *v.* Parker, 59 Ga. 424, under the particular conditions then existing, this court held that a provision in a charter of a mining company authorizing the company, upon just compensation to the owner, to condemn over the lands of another

a right of way for the carriage of water necessarily used in gold mining, was not an unconstitutional exercise of the right of eminent domain. This ruling was put upon the principle that the development of the mineral resources of the State, and the production of the metal in which our constitutional currency is stamped, are of public benefit. The case last cited distinguishes the case of Loughbridge *v.* Harris. Upon the subject of what is or is not a public use, the following other decisions of this court may be mentioned: Mayor of Macon *v.* Harris, 73 Ga. 448; Butler *v.* Thomasville, 74 Ga. 570; Hopkins *v.* Fla. Cen. R. Co., 97 Ga. 113; Garbutt Lumber Co. *v.* Georgia and Alabama Ry., 111 Ga. 714; Jones *v.* Venable, 120 Ga. 1. These cases are not in their facts like the case at bar; and in view of the difference, and inasmuch as these cases arose under different conditions from those which at this time command our attention, we do not deem it necessary to make further reference to them. The act being constitutional, and the facts showing the contemplated use of the land of the plaintiff to be designed for no other than public purposes, it follows that the court did not err in refusing the injunction.[1]

Judgment affirmed. All the Justices concur.

DUNN *v.* WESTERN UNION TELEGRAPH COMPANY.

COURT OF APPEALS OF GEORGIA, 1908.

[2 *Ga. App.* 845.]

POWELL, J. The grave question remaining in the case is whether the petition sets forth a cause of action against the telegraph company. The gist of the action is not the failure or refusal of the telegraph company to transmit a message tendered to it, but the alleged disrespectful, humiliating, and insulting treatment by its agent, of a member of the general public, lawfully in its office on business with the company. The contention is that the entire damage alleged is such as affects only the feelings of the plaintiff, and that damages for mental suffering can-

[1] *Accord:* Walker *v.* Shasta Power Co., 160 Fed. 856; Jones *v.* No. Ga. El. Co., 125 Ga. 618, 54 S. E. 85; Sammons *v.* Kearney Power & Irr. Co. (Neb.), 110 N. W. 308; Rockingham Co. Light, Heat & Power Co. *v.* Hobbs, 72 N. H. 53; *Re* Niagara L. & E. Power Co., 97 N. Y. Supp. 853; Grande Ronde Electrical Co. *v.* Drake, 46 Oreg. 243. *Contra* Brown *v.* Gerald, 101 Me. 351; State *ex rel. v.* Superior Court, Wash., 85 Pac. 666. See also Fallsburg Power & Mfg. Co. *v.* Alexander, 101 Var. 98; Avery *v.* Vermont Electric Co., 75 Vt. 235.—ED.

not be recovered unless there is a concomitant injury to person or purse. The further contention is made that no breach of duty to the plaintiff is shown. We will dispose of these contentions in inverse order.

A telegraph company is a private corporation performing a public duty; and whether it is a common carrier, a bailee, or a person engaged in a business *sui generis*, is immaterial. It is a public service company, one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business in their own way. All such corporations, on account of the interest which the public has in the manner in which their business is conducted, as well as on account of the special franchises enjoyed by them, must observe certain rules of dealing with the public. These rules, and the corresponding duties which are implied from the nature of the calling, are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. "Upon each person, in every position he occupies, peculiar duties are imposed, each demanding its discharge with an emphasis accentuated or modified by the attendant circumstances." Ray, Negligence of Imposed Duties, Personal, § 1: "One of the great requirements which the government demands of every institution impressed with a public interest — and one which is thrown over every citizen as a great and protective shield — is the duty to act impartially with all. They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted from others in like circumstances." Jones, Telegraph and Telephone Companies, § 236. From this principle, universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public, as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do, safe and decent access to the places opened up for the transaction of the business in question. This safety does not not mean mere physical safety; nor this decency mere absence of obscenity, but by the employment of the expression "safe and decent access" it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment. A member of the public is not to be deterred from transacting or offering to transact business which the law compels a telegraph company to accept impartially from every person, by reason of the fact that he cannot enter the public office without being subjected to insult or personal affront. A violation of this duty has occurred whenever a person entering the telegraph office for the purpose of sending a message has been met with disrespectful or insulting treatment at the hands of the company's agent. It is immaterial that the person thus injured had no personal interest in the message, that he was the mere agent of another; for there is no

such requirement as that persons desiring to transact business with public utility corporations shall do so in person. The fact that the right of respectful treatment, while attempting to do business with a public service company, follows as the natural sequence from the right to be served impartially and at all reasonable times, seems to render the citation of authority as to the existence of this right of respectful treatment unnecessary. We do, however, call attention to the Georgia cases of Gasway *v.* Atlanta & West Point R. Co., 58 Ga. 216, 221; Georgia R. Co. *v.* Richmond, 93 Ga. 495, 502. It will be noted that while these were actions against carriers, in neither case did the liability depend upon the fact that the plaintiff was a passenger. In Gasway's case he was attempting to check baggage as agent for his wife; in Richmond's case he had called at the passenger station to see about certain trunks; and the court, in deciding the case, took pains to call attention to the fact that the relation of carrier and passenger did not exist at that time. We might multiply citation of precedents, but these are sufficient.[1]

STATE EX REL. GWYNN *v.* CITIZENS' TELEPHONE CO.

SUPREME COURT OF SOUTH CAROLINA, 1901.

[61 *S. C.* 83.[2]]

PETITION by J. B. Gwynn for *mandamus* against Citizens' Telephone Co., requiring it to place a telephone in his store and in his residence. From order refusing the writ, petitioner appeals.

Mr. Chief Justice MCIVER. This was an application, addressed to the Circuit Court, for a writ of *mandamus*, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and telephonic communication afforded to its

[1] This case is abridged. — ED.

other subscribers. The application was refused by the circuit judge, and the relator appealed to this court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions, as stated by counsel for respondent, in his argument here, which are presented by this appeal.

As is said by the circuit judge in his decree, "There is practically no dispute as to the facts," which may be stated, substantially, as follows: The relator is now and has been since the 28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city; that the respondent, on the 16th day of August, 1898, became a corporation under the laws of this State, for the purpose of owning, constructing, using, and maintaining electric telephone lines and exchange within the city of Spartanburg, and as such is now and was at the time of the commencement of this proceeding engaged in the said business, having established an exchange in said city, from which connections were made to telephone instruments in offices, places of business and residences of its subscribers; that the city council of Spartanburg has authorized the respondent to erect poles in the streets of the city for the purpose of transporting news over its wires to its subscribers, having a system of wires throughout the city, connected with telephone instruments furnished by it to its subscribers; that whenever a person desires a telephone, it is placed in the office, residence, or place of business of the applicant, at the expense of the respondent, with authority to the subscriber to use the same, upon certain rates and terms, for the purpose of telephonic communication with others; that some time in the year 1899, the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere; that this was done under an agreement with the relator that he would use respondent's telephone exclusively, and not the telephone of the Bell Telephone Company, and that certain of respondent's subscribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent, under a similar agreement, but some of respondent's subscribers, including some merchants, physicians, and others and one groceryman, whose place of business was on the same street of said city as the grocery store of relator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclusive use of respondent's telephones, and they were using both telephones; that on or about the 6th of February, 1900, the respondent learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this State, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication between the two

structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell Telephone — respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones; that on or about the 8th of February, 1900, the relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, and that relator thereupon demanded that respondent place one of their telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers; but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephones exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company.

The respondent, in its answer, alleges: "That its supply of telephone instruments is limited, and that it is with difficulty that this respondent can furnish such instruments to all applicants therefor. That even if the respondent was legally bound to furnish such instruments now, it would be impossible for it to do so within less than sixty days, for the reason of its inability to enlarge its switch-board." But as this allegation is not responsive to any allegation contained in relator's petition, and was not sustained by any evidence, so far as the "Case" shows, it cannot now be considered. Beside, this court, having reached the conclusion, as will presently appear, that the relator is entitled to the *mandamus* for which purpose the case will be remanded to the Circuit Court, with instructions to carry out the views herein announced, that court can, in its order directing the writ of *mandamus* to be issued, make such provision, by giving a reasonable time within which the duty sought to be enforced shall be performed, provided the fact be as alleged in the foregoing quotation from respondent's answer.

We will next proceed to consider the several questions of law, growing out of the facts above stated, and presented by this appeal. These questions are thus stated in the argument here, on the part of the respondent, and we propose to adopt that statement. 1st. Is the defendant telephone company, in any sense, a common carrier? 2. Can the defendant telephone company be required, in any case, against its will, to supply one of its instruments to petitioner? 3. Can the defendant telephone company be required by *mandamus*, under the circumstances of this case, to so furnish its instruments to petitioner?

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, *a quasi* common carrier of news, and as such was under an obligation to serve all alike

who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal — that the relator refused to agree that he would use respondent's telephone system exclusively — was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was, at the time, affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was, in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell Telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper, unless such shipper would agree to patronize its line exclusively and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent, when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell Telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one. As to the other reason suggested why the *mandamus* prayed for should not issue under the circumstances of this case, to wit: that respondent did not have the means to comply with the demand of the relator within less than sixty days, it is only necessary to repeat what we have said above: that there does not appear to be any evidence in the "Case" to sustain the fact upon which this suggestion is based, and, therefore, it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the Circuit Court, which can, in ordering the *mandamus* to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with the relator's demand.

As to the position taken in the argument — that *mandamus* is not the proper remedy — we think it entirely clear, both upon principle and authority, that *mandamus* is the appropriate remedy in a case of this kind.

The judgment of this court is, that the judgment of the Circuit Court be reversed and that the case be remanded to that court, with instructions to carry out the views therein announced.[1]

SHEPARD *v.* GOLD STOCK AND TELEGRAPH CO.

SUPREME COURT OF NEW YORK, 1885.

[38 *Hun*, 338.]

APPEAL from an order vacating an injunction restraining the defendant from removing the gold and stock reporting instruments from the rooms of the plaintiff.

DYKMAN, J. The object of this action is to restrain the defendant from removing the gold and stock reporting instruments from the plaintiff's place of business, and a preliminary injunction was obtained which did forbid such removal. That order was vacated at Special Term, and we have an appeal from that order. The appeal is without merit. In the contract by which the plaintiff procured the possession of the instruments, the company reserved the unqualified right to discontinue the reports and remove the instruments without notice when they were used in any way which it considered detrimental to its interests. The injunction prohibited the exercise of the right thus reserved, and was for that reason properly vacated.

The order should be affirmed, with costs and disbursements.

PRATT, J. Defendants are a public corporation under obligation to render their services impartially and without discrimination to all persons who comply with their reasonable rules. Yet the contract entered into by the parties is not to be disregarded, and such reasonable stipulations as it contains will be respected and enforced by the court. The contract provides as follows: "These reports are furnished to subscribers for their private use in their own business, exclusively. It is stipulated that such will not sell or give up the copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule subscription by one party for the benefit of himself and others at their joint expense will not be received." The stipulation is reasonable and not in conflict with the duty owed by

[1] *Compare:* State *v.* Telephone Co., 23 Fed. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Talley, 118 Ind. 194; State *v.* Telephone Co., 17 Neb. 126; State *v.* Telephone Co., 36 Oh. St. 296; Telephone Co. *v.* Com., 3 Atl. 825; Telephone Co. *v.* Telephone Co., 61 Vt. 241. — ED.

defendants to the public. The proof shows that plaintiff habitually caused the quotations, when received upon defendant's instrument, to be transmitted by private wire to Lawrence Gross & Co., at 574 Fifth Avenue.

Plaintiff seeks to justify this breach of the conditions upon which he received the instrument by alleging that he is interested in business with that firm. We think this affords no justification. If plaintiff, by entering into business relations with another firm, could gain a right to repeat the quotations he might, if diligent, absorb a great share of defendant's business. Plaintiff's attempted justification brings out clearly the reasonableness of the clause in the contract to which we have referred. The violation by plaintiff of the stipulation upon which he received the instrument amply sustains the order vacating the injunction.

Order affirmed, with costs.[1]

Present — PRATT and DYKMAN, JJ.; BARNARD, P. J., not sitting.

Order vacating injunction affirmed, with costs.

THE INTER-OCEAN PUBLISHING CO. *v.* THE ASSOCIATED PRESS.

SUPREME COURT OF ILLINOIS, 1900.

[184 *Ill.* 438.]

MR. JUSTICE PHILLIPS[2] delivered the opinion of the court:

The Inter-Ocean Publishing Company, a corporation organized under the laws of the State of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as "The Daily Inter-Ocean" and "The Weekly Inter-Ocean," which have a wide circulation in the States and Territories of the United States. The Associated Press is a corporation organized under the laws of the State of Illinois in 1892. The object of its creation was, "To buy, gather, and accumulate information and news; to vend, supply, distribute, and publish the same; to purchase, erect, lease, operate, and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares, and merchandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering, and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news

[1] *Compare:* Grain and Stock Exchange *v.* Board of Trade, 127 Ill. 153; Telegraph Co. *v.* Hyer, 22 Fla. 637; Telegraph Co. *v.* Wilson, 108 Ind. 308; Brown *v.* Telegraph, 6 Utah, 236.

[2] The case is abridged. — ED.

to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Article 11. — Sec. 8. *Sale or purchase of specials.* — No member shall furnish, or permit any one to furnish, its special or other news to, or shall receive news from, any person, firm, or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm, or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors." . . .

The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and to preserve such monopoly had declared the Sun Printing and Publishing Association a rival or competitor in business and antagonistic to it, and sought to prohibit its members from buying news therefrom under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing and Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complainants against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing and Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing and Publishing Association of New York; that the right to receive the news gathered by appellee and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is absolutely needed in publishing

its newspapers, from the Sun Printing and Publishing Association; that the appellee is attempting to force appellant to cease taking news from the latter association, but to do so would work irreparable damage and injury to appellant, and would prevent it from furnishing needed, important, and necessary news to the public, and would tend to create in favor of appellee a monopoly.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centred in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them.

We hold that the Circuit Court of Cook County erred in entering a decree dismissing the bill for want of equity, and the Appellate Court for the First District erred in affirming the same. The judgment of the Appellate Court for the First District and the decree of the Circuit Court of Cook County are each reversed, and the cause is remanded to the Circuit Court of Cook County, with directions to enter a decree as prayed for in the bill. *Reversed and remanded.*[1]

[1] *Compare:* State *v.* Associated Press, 159 Mo. 410. — Ed.

MUNN *v.* ILLINOIS.

SUPREME COURT OF THE UNITED STATES, 1876.

[94 *U. S.* 113.[1]]

From an agreed statement of facts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the act of April 25, 1871. The city of Chicago then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said act, except in two particulars: *first*, they had not taken out a license, nor given a bond, as required by sects. 3 and 4; and, *second*, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined $100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error:—

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

[1] This case is somewhat abridged. — ED.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

Mr. Chief Justice WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of Government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as

they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagon-

ers, carmen, and draymen, and the rates of commission of auctioneers," 9 Stat. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the

largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll."

Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should

not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of the property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its

jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other. *Judgment affirmed.*[1]

Mr. Justice FIELD and Mr. Justice STRONG dissented.

PEOPLE *v.* BUDD.

COURT OF APPEALS, NEW YORK, 1889.

[117 *N. Y.* 1.[2]]

APPEAL from judgment of the general term of the Superior Court of the city of Buffalo entered upon an order made December 31, 1888, which affirmed a judgment of a criminal term of said court entered upon a verdict, convicting defendant of a misdemeanor in violating the provisions of the act (chap. 581, Laws of 1888) known as the Elevator Act.

The material facts are stated in the opinion.

Decided October 15, 1889.

ANDREWS, J. The main question upon this record is whether the legislation fixing the maximum charge for elevating grain, contained in the act (chapter 581, Laws 1888), is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State at five-eighths of one cent a bushel, and for trimming and shovelling to the leg of the elevator, in the process of handling grain by means of elevators, "lake vessels, or propellers, the ocean vessels or steamships, and canal boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than 130,000 population. The defendant, the

[1] *Compare:* Davis *v.* State, 68 Ala. 58; Breechbill *v.* Randall, 102 Ind. 528; Nash *v.* Paige, 80 Ky. 539; Dock Co. *v.* Garrity, 115 Ill. 155; State *v.* Edwards, 86 Me. 105; R. R. *v.* Stock Yard Co., 45 N. J. Eq. 50; Ryan *v.* Terminal Co., 102 Tenn. 119; Barrington *v.* Dock Co., 15 Wash. 175. — ED.

[2] This case is abridged. — ED.

manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company, for elevating, raising, and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and for shoveling to the leg of the elevator the carrier was charged and compelled to pay $4 for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed, pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator $1.75 a thousand bushels for the use of the steam-shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services, and the expense of the steam-shovel, charge the carrier for each thousand bushels of grain shoveled the sum of $4. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count, charging a violation of the first section in two particulars, viz., in exacting more than the statute rate for elevating the cargo, and exacting more than the actual cost for shoveling the grain to the leg of the elevator. . . .

The question is whether the power of the legislature to regulate charges for the use of property, and the rendition of services connected with it, depend in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection from the government, or some peculiar benefit in the prosecution of his business. Lord HALE, in the treatises De Portibus Maris and De Jure Maris, so largely quoted from in the opinions in the Munn Case, used the language that when private property is "affected with a public interest it ceases to be *juris privati* only," in assigning the reason why ferries and public wharves should be under public regulation, and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing places on both sides of the stream, without a charter from the king, or a prescription time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative, it will be seen that it was vested in the king as a means by which a business in which the whole community were interested could be regulated. In other words, it was simply one mode of exercising a prerogative of government — that is to say, through the sovereign instead of through Parliament — in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. Lord KENYON in Rorke *v.* Dayrell, 4 Term R. 410, said: "The prerogatives [of the crown] are not given for the

personal advantage of the king, but they are allowed to exist because they are beneficial to the subject;" and it is said in Chitty on Prerogatives (page 4): "The splendor, rights, and power of the crown were attached to it for the benefit of the people, and not for the private gratification of the subject." And Lord HALE, in one of the passages referred to, in stating the reason why a man may not set up a ferry without a charter from the king, says: "Because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll which is a common charge, and every ferry ought to be under a public regulation." The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord HALE says, could not be taken without lawful title by charter or prescription. De Port. Mar. 77. But the king, if he maintained a public wharf, was under the same obligation as a subject to exact only reasonable tolls, nor could the king authorize unreasonable tolls to be taken by a subject. The language of Lord HALE is explicit upon both these points: "If the king or subject have a public wharf into which all persons that come to that port must come to unload their goods, as for the purpose, because they are the wharves only licensed by the queen, according to the statute of 1 Eliz. c. 11, or because there is no other wharf in that port, as it may fall out when a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, passage, etc. Neither can they be enhanced to an immoderate degree, but the duties must be reasonable and moderate, though settled by the king's license or charter."

The contention that the right to regulate the charges of ferrymen or wharfingers was founded on the fact that tolls could not be taken without the king's license does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he by express license authorize the taking of more. The language of Lord HALE, that private property may be affected by a public interest, cannot justly, we think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign. The control which by common law and by statute is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and, even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point

of reasonable compensation. From time to time statutes have been enacted in England and in this country fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers until recent times was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The state conferred no franchise, and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers, and the subjection of the business to public regulation, were based on the character of the business; or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment." Jones, Bailm. App. It is only a public employment in the sense of the language of Lord HALE, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law, that common carriers must serve the public for a reasonable compensation, became a part of the law of this state, and from the adoption of the constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn Case, which was cited with approval on this point in Sawyer *v.* Davis, 136 Mass. 239. It accords with the language of Chief Justice SHAW in Com. *v.* Alger, 7 Cush. 53: "Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner or any other person to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." The practice of the legislature in this and other states to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is received by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter the legislature may nevertheless interfere, and prescribe or limit the charges of railroad corporations. The Granger Cases, 94 U. S. 113; Dow *v.* Beidelman, 125 U. S. 680; EARL, J., in People *v.* Railroad Co., 70 N. Y. 569; RUGER, C. J., in Railroad Co. *v.* Railroad Co., 111 N. Y. 132.

The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state, in constituting a corporation, may prescribe or limit its powers, and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchise are the duties and obligations imposed by the act of incorporation. But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of services connected with such use, unless there is a legal monopoly, or special governmental privileges or protection have been bestowed. It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to the details of personal conduct, and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society, and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which by legislation would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by the most imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty, — liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo, and finds its way through the Erie Canal and Hudson River to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, the cargo of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The state of New York, in the construction of the Erie Canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The legislature of the state, in entering upon the work of constructing a water-way between Lake Erie and the Atlantic Ocean, sets forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures, and commerce, mitigate the calamities of war, and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States." In the construction and enlargement of the canal the state has expended vast sums of money, raised by taxation; and finally, to still further promote the interests of commerce, it has made the canal a free highway, and maintains it by a direct tax upon the people of the state. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the state, promoted the prosperity of the people, and to it, more perhaps than to any other single cause, is it owing that the city of New York has become the commercial centre of the Union.

Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of transportation which shall enhance the cost of the necessaries of life,

or force the trade in grain into channels outside of our state. In Hooker *v.* Vandewater, 4 Denio, 349, the court was called upon to consider the validity of an agreement between certain transportation lines on the canal to keep up the price of freights. The court held the agreement to be illegal, and JEWETT, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern, and in which the public have a deep interest, does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys, or even relaxes, competition in trade is injurious, if not fatal, to it." The same question came up a second time in Stanton *v.* Allen, 5 Denio, 434, and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the state, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are, at the same time, a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole state." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chit. Prerog. 162); and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases allotted to the king by the constitution," and many governmental powers vested in the sovereign in England have since our Revolution devolved on the legislatures of the states. The statutes of England in earlier time were full of oppressive commercial regulations, now, happily, to a great extent abrogated; but that the interests of commerce are matters of public concern all states and governments have fully recognized.

The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive, and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges, and to bring into the combination any new elevator which may be erected, and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination in fact exists the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake vessels and canal-boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said CHASE, C. J., in the License Tax Cases, 5 Wall. 469, "can know nothing of public policy, except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord HALE, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen, and the interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges of hackmen springs from the fact that they are assigned stands in the public streets; that the legislature may regulate the toll on ferries because the right to establish a ferry is a franchise, and therefore the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the beds of navigable streams, the title to which was in the sovereign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute it was taken subject to regulation by law. The plain reason, we think, why the charges of hackmen and ferrymen were made subject to public regulation is that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the beds of navigable streams was frequently vested in a subject, and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between wharves built upon the beds of navigable waters, the title to which was in the sovereign, and wharves erected upon navigable streams, the beds of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord HALE on the ground of a virtual, as distinguished from a legal, monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit con-

ferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is that the prohibition, as well as the regulation, of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances collectively create an exceptional case, and justify legislative regulation.

The case of Munn *v.* Illinois has been frequently cited with approval by courts in other states. Nash *v.* Page, 80 Ky. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Telegraph Co., 66 Md. 399; Davis *v.* State, 68 Ala. 58. In Nash *v.* Page it was held, upon the doctrine of the Munn Case, that warehousemen, for the public sale and purchase of tobacco in Louisville, exercised a public business, and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In Hockett *v.* State it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were, in legal contemplation, devoted to public use. In Telegraph Co. *v.* Telephone Co. legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn Case. The criticism to which the Munn Case has been subjected has proceeded mainly ou a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the King Case, 110 N. Y. 418, it was given a much broader scope, and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public enter-

tainment. In that case the owner of the skating-rink derived no special privilege or protection from the state. The public held no right, in any legal sense, to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment he subjected it to public regulations. There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty, and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which have been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power, and invested it with the prerogative of bringing every legislative act to the test of the Constitution. But no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberration may have marked its course. So, also, in that wide range of legislative powers over persons and property which lie outside of the prohibitions of the Constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life-blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy if, at the bottom, the legislation under it is oppressive and unjust. The remedy by taking away the power of the legislature to act at will would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules a danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the legislature from correct principles of

government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as any reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional, as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature. The judgment should be affirmed.[1]

BRASS *v.* NORTH DAKOTA EX REL. STOESER.

SUPREME COURT OF THE UNITED STATES, 1894.

[153 *U. S.* 391.[2]]

NORMAN BRASS, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the State of North Dakota. The defendant in error, Louis W. Stoeser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat. On September 30, 1891, Stoeser applied to store a part of his wheat-crop for the compensation fixed by section eleven of chapter 126 of the Laws of North Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. On this refusal Stoeser filed in the District Court of Ramsey County, North Dakota, a petition for an alternative writ of *mandamus*. The District Court granted an alternative writ of *mandamus* (as follows). . . .

Mr. Justice SHIRAS . . . The legislature of the State of North Dakota, by an act approved March 7, 1891, c. 126, Laws of 1891, p. 321, and entitled "An Act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the fourth section thereof, that "all buildings, elevators, or warehouses in this State, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation, or trust, for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this State, as above

[1] *Compare:* Railroad Co. *v.* Stockyard Co., 45 N. J. Eq. 50; Belcher *v.* Grain Elevator, 101 Mo. 192; McCullough *v.* Brown, 41 S. C. 247; Steamship Co. *v.* Elevator Co., 75 Minn. 312. — ED.

[2] This case is abridged. — ED.

described, whether said owners or operators reside within this State or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the fifth section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this State shall file with the railroad commissioners of the State a bond to the State of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of not less than $5,000 nor more than $75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the State in relation thereto;" and in the eleventh section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner;" and by the twelfth section it is provided that "any person, firm, or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the District Court of the Second Judicial District of the State of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the Supreme Court of the State. Brass v. North Dakota, 52 N. W. Rep. 408.

In the cases thus brought to this court from the States of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those States, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the eighth section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States, and to the Fourteenth Amendment, which ordains that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed,

their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire State.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire State, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in trans-shipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural

State, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered, at some length, into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to justify to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of *mandamus*, based his defence wholly upon grounds arising under the Constitution of the State and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the States. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly *Affirmed.*

Mr. Justice Brewer, with whom concurred Mr. Justice Field, Mr. Justice Jackson, and Mr. Justice White, dissenting.

OPINIONS OF THE JUSTICES.

Massachusetts Supreme Court, 1904.

[182 *Mass.* 605.]

[At the time of the scarcity of coal in the early part of 1903 by reason of the strike of Pennsylvania miners, the Legislature of Massachusetts asked the judges of the Massachusetts Supreme Court a series of questions as to its power to authorize cities or towns to purchase and sell coal and wood. Extract from the replies signed by the majority of the judges is subjoined.]

We do not deem it necessary to restate the reasons and arguments which have led legislatures and courts to nearly, if not quite, uniform conclusions in regard to the attitude which the government should maintain, under existing constitutions, towards the transaction of common kinds of business which can be conducted successfully by individuals, without the use of any governmental function. These can be found in numerous published opinions of the courts, some of which are cited in the opinion first above mentioned.

It is established that under our Constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house taken by right of eminent

domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government there is no way to obtain the money except by taxation. Money cannot be raised by taxation except for a public use.

Until within a few years it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the State to enter as a competitor into the field of industrial enterprise, with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessaries of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities.

Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this State beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel, and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means.

RATCLIFF *v.* WICHITA UNION STOCKYARDS COMPANY.

SUPREME COURT OF KANSAS, 1906.

[86 *Pac.* 150.[1]]

ACTION by J. W. Ratcliff to recover charges on live stock beyond the statutory rate on cattle placed in and marketed at the Wichita Union Stockyards.

JOHNSTON, C. J. The operation of stockyards has more of the characteristics of a public business than the carrying on of an elevator or a warehouse. It possesses the market features, including considerations of sanitation and health, and it also has more of the monopolistic feature. The stockyards in question are situated in a commercial center and constitute the public live stock market for a great region, largely devoted to live stock business. The principal railroads of the Southwest country enter Wichita, and their tracks all unite in the stockyards, and the business is therefore intimately related to the business of transportation. Here the stock raisers and shippers meet and deal with the packers and purchasers, and here live stock in transit from Oklahoma, Texas, and Colorado to more distant markets are unloaded for rest, feeding, and care. No other market exists nearer than Kansas City on the east, which is about 260 miles away, and the nearest ones on the west are Denver and Pueblo, about 500 miles away. Because of the nature of the business and the railroad facilities the establishment of other markets at or near Wichita is impracticable, and hence these stockyards are, and of necessity will be, the only available place where the breeders, feeders, and dealers of a great scope of country can conveniently market their live stock. The company has, therefore, a practical monopoly of a vast business affecting thousands of people who are almost obliged to deal at that market and at the rates which the company may choose to charge. To the company is committed the feeding, watering, and weighing of cattle sent from great distances, whether accompanied by the owner or not, and this is an additional reason for regulation and control. In Cotting *v.* Kansas City Stockyards Company (C. C.), 82 Fed. 850, it was held that "a stockyard business located in a large city at the junction of many railroad lines, which furnishes the only proper facilities for the unloading, resting, and feeding of live stock in transit and for the sale of cattle in said city, is affected with a public use so as to be subject to legislative control, and the proper legislative body may prescribe a maximum rate of compensation for the care and handling of stock thereat." This case was taken to the Supreme Court of the United States, where it was reversed because of a discriminatory provision of the statute under consideration. In determining that question, however, Justice BREWER, who rendered the decision, in commenting on the nature of the business of stockyards and the interest of the public in it,

[1] Only one extract is printed. — ED.

took occasion to say: "Tested by the rule laid down in Munn *v.* Illinois, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stockyards company. Its stockyards are situated in one of the gateways of the west, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation." Cotting *v.* Kansas City Stockyards, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. In Delaware, etc., Railroad Company *v.* Central Stockyards Company, 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855, the court discussed the nature of the business, and held that the business of maintaining stockyards corresponds with that of warehousemen, and therefore is subject to the same general principles of law. It was held, however, that in the absence of a statute a court of chancery could not impose regulations upon those engaged in the business without usurping legislative power. In Stock Exchange *v.* Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107, it was held that the market quotations and reports of the board of trade of Chicago had become affected with a public interest, and so long as it continued in business it must furnish reports and quotations to all who may desire them for lawful purposes, and upon the same terms. In a later case before the same court it was held that the Chicago Live Stock Exchange could not be treated as a public market in the ordinary sense, but in the course of the decision it was said that the character and magnitude of its business was such as "to warrant the Legislature in the exercise of its legislative discretion in declaring a public use, and placing said business under local control and supervision, but such power, in our opinion, does not rest with the courts." American Live Stock Commission Company *v.* Chicago Live Stock Exchange, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385. See, also, Head *v.* Amoskeag Manufacturing Company, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889; State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528, Nash *v.* Page, 80 Ky. 539, 44 Am. Rep. 490; Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128; Baker *v.* State, 54 Wis. 368, 12 N. W. 12; Breechbill *v.* Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; State *ex rel.* *v.* Gas Co., 34 Ohio St. 572, 32 Am. Rep. 390; Freund on Police Power, § 373; Cooley's Constitutional Limitations, 870; 1 Tiedeman on State and Federal Control, § 95. We conclude that the stockyards business as conducted in Wichita is clothed with a public interest, and that the state in the exercise of its police power may, within constitutional limitations, subject it to regulation and control.[1]

[1] See also Cotting *v.* Kansas City Stockyards Co., 183 U. S. 79. But see Delaware & W. Ry. Co. *v.* Central Stockyards Co., 46 N. J. L. 280. — Ed.

STATE v. JACKSONVILLE TERMINAL CO.

SUPREME COURT OF FLORIDA, 1900.

[41 *Fla.* 377.[1]]

XI. Ninth and eleventh grounds of the motion to quash: The regulation made by the commissioners, under the power conferred upon them, in this case is in no sense an "appropriation" of any private property or right of way within the meaning of section 29, Art. XVI of the constitution, so as to require the compensation therefor to be ascertained by a jury of twelve men. The defendant in error, as we have seen, had devoted its property to a use essentially public, is performing services of a public nature, and is subject to be controlled by the public for public welfare. That use to which it has voluntarily devoted its property is to furnish passenger terminal facilities to railroad common carriers. It is discriminating among the railroads that it will serve, and the commissioners under power granted them by the legislature have determined that such discrimination as against a particular railroad is unjust and contrary to the best interest and convenience of the public. It has, therefore, made a regulation that this railroad be admitted to the facilities which the defendant in error is furnishing other railroad common carriers upon payment of reasonable compensation. It is no more an appropriation of the property of the terminal company than is the law which requires common carriers to transport all persons at a reasonable rate of compensation, or the law which requires an inn-keeper to furnish accommodations to all who apply, and at reasonable rates if fixed by the legislature. While it would seem that one was as much an appropriation of property as another, it surely will not be contended that a passenger or a traveller must condemn his way into a railroad passenger car or hotel in order to secure the transportation of the lodging to which he is by the law entitled. There is a very clear distinction between a taking or an appropriation of property for a public use and regulating the use of property devoted to a use in which the public has an interest. The latter is an exercise of the police power, as it is called; the former of the power of eminent domain. The State in the former case compels the dedication of the property or some interest therein to a public use, or, if already dedicated to one public use, then to another. In the latter, the owner has voluntarily or in pursuance of the provisions of its charter, dedicated the property to a use in which the public has an interest, and the use of that property so dedicated is merely regulated and controlled for the public welfare. In this case the regulation complained of does not compel the defendant in error to dedicate its prop-

[1] Only one point is printed. — ED.

erty to the public use, or to a different public use. It has already voluntarily and presumably in pursuance of its charter powers devoted its property to a public use by undertaking to furnish for railroad common carriers and the public served by them terminal facilities to aid and enable these public agencies to perform their obligations to the public and to assist them in such performance. The State regulates this use of the property by requiring that the charges for such uses and privileges shall be reasonable, and by requiring the terminal company in performing the services and conducting the business which it has so voluntarily assumed, to perform such services and conduct such business impartially and without discrimination wherever the public interests require them to be so performed and conducted. The regulation complained of does not appropriate property; it merely prevents abuses, prohibits unjust discrimination and excessive charges, and is, therefore, valid. Of course if the regulation sought to be enforced is valid, its enforcement by *mandamus* cannot be construed as a taking or appropriation of property under the power of eminent domain, or as a deprivation of property without due process of law.

TRANSPORTATION CO. *v.* STANDARD OIL CO.

COURT OF APPEALS, WEST VIRGINIA, 1901.

[40 *S. E. Rep.* 591.]

BRANNON, J. The West Virginia Transportation Company brought trespass on the case in Wood County against the Standard Oil Company and the Eureka Pipe Line Company, all corporations, and upon demurrer to the declaration judgment was rendered for the defendants. The first count of the declaration charges that the plaintiff was engaged in the business of transporting petroleum oils by means of pipe lines and tank cars from Volcano and vicinity to Parkersburg, and in storing oil, and had expended $300,000 in acquiring land, rights of way, lines of tubing, and other things necessary in its business, and had built up a large and lucrative business, and that the defendants maliciously and wickedly contriving and intending to injure the plaintiff and ruin its business, and render its plant and property worthless, and deprive it of all its

business, did confederate and conspire together and with the West Virginia Oil Company, another corporation, and with C. H. Shattuck and other persons unknown to the plaintiff, to prevent all persons producing, refining, selling, or transporting oils, and particularly to prevent the plaintiff from transporting oils through its pipe lines and by means of its tank cars, and from storing oil in its storage tanks, and from executing any lawful trade in connection therewith.

At first blush this conduct might appear wrong; but a second thought again presents the question whether the defendants in this did anything unlawful. The defendant companies were all in common interest. Could they not unite to further their interests? Could not the Standard Oil Company buy from whom it chose? And within the pale of this right could it not impose such conditions as it chose? Cannot the village merchant say to the farmer, "I will not buy your eggs unless you buy my calico"? Cannot the big mill owner refuse to buy wheat from those who do not ship it over a railroad or steamboat line owned by him? Cannot the mill owner refuse to lease his farm to those who do not sell products to his mill? He may be exacting and oppressive, but can other mill owners sue him for this? Is this right not a part and parcel of his business right? It is the right, even when there is no common ownership, as there is in this case, of one man to buy of whom he chooses; and he can impose arbitrary, hard conditions, if the other party chooses to accede to them. So it is the clear right of the other party to sell to whom he chooses, and he having this right, how does the other party do a wrong in purchasing from him? The right of the one carries with it the right of the other. These producers of oil had the right to sell to whom they chose, to ship their oil by what pipe line they chose, and they had the right to submit to the terms of the Standard Oil Company, and in view of this right the company could buy from whom it chose, and on such terms as it chose; for the right of the former would bear no fruitage, would be futile, without the corresponding right of contract in the company. Observe the question here is not their own interests in lawful competition with others. If they possessed the lawful right above stated, what matters it that they did have the intent to cut down the business of others, or that they did cut it down and injure others, though they did this that they might themselves fatten? So far this first count charges only the exercise by the defendants of a right of constitutional liberty, accorded alike to all, — simply the right of self-advancement in legitimate business, self-preservation, we may say.

HURLEY, ADMINISTRATOR *v.* EDDINGFIELD.

SUPREME COURT OF INDIANA, 1901.

[156 *Ind.* 415.]

BAKER, J. Appellant sued appellee for $10,000 damages for wrongfully causing the death of his intestate. The court sustained appellee's demurrrer to the complaint; and this ruling is assigned as errror.

The material facts alleged may be summarized thus: At and for years before decedent's death appellee was a practicing physician at Mace in Montgomery county, duly licensed under the laws of the State. He held himself out to the public as a general practitioner of medicine. He had been decedent's family physician. Decedent became dangerously ill and sent for appellee. The messenger informed appellee of decedent's violent sickness, tendered him his fees for his services, and stated to him that no other physician was procurable in time and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee's immediate service, and he could have gone to the relief of decedent, if he had been willing to do so. Death ensued, without decedent's fault, and wholly from appellee's wrongful act.

The alleged wrongful act was appellee's refusal to enter into a contract of employment. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to every one who applied. Wharton on Neg., §731. The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without license. Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventive, not a compulsive, measure. In obtaining the State's license (permission) to practice medicine, the State does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of inn-keepers, common carriers, and the like, are beside the mark.

Judgment affirmed.

Lewis

GERMAN ALLIANCE INSURANCE COMPANY *v.* KANSAS SUPERINTENDENT OF INSURANCE.

SUPREME COURT OF THE UNITED STATES, 1914.

[233 *U. S.* 389.[1]]

BILL in equity to restrain the enforcement of the provisions of an act of the State of Kansas entitled, "An Act relating to Fire Insurance, and to provide for the Regulation and Control of Rates of Premium thereon, and to prevent Discriminations therein." Ch. 152, Session Laws of 1909.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times — certainly the sense of the modern world — is of the greatest public concern. It is, therefore, within the principle we have announced. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

[1] Three Justices concurred with the opinion of the court printed in part above; Mr. Justice LAMAR wrote a dissenting opinion in which two Justices concurred. — ED.

THE PIPE LINE CASES.

SUPREME COURT OF THE UNITED STATES, 1914.

[234 *U. S.* 548.[1]]

The CHIEF JUSTICE concurring.

Agreeing in every particular with the conclusions of the court and with its reasoning except as to one special subject, my concurrence as to that matter because of its importance is separately stated. The matter to which I refer is the exclusion of the Uncle Sam Oil Company from the operation of the act. The view which leads the court to exclude it is that the company was not engaged in transportation under the statute, a conclusion to which I do not assent. The facts are these: That company owns wells in one State from which it has pipe lines to its refinery in another State, and pumps its own oil through such pipe lines to its refinery and the product of course when reduced at the refinery passes into the markets of consumption. It seems to me that the business thus carried on is transportation in interstate commerce within the statute. But despite this I think the company is not embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the Fifth Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation. It is shown beyond question that the company buys no oil and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions in my opinion there is no power under the Constitution without the exercise of the right of eminent domain to convert without its consent the private business of the company into a public one.

Of course this view has no application to the other companies which the court holds are subject to the act because as pointed out the principal ones were chartered as common carriers and they all either directly or as a necessary result of their association were engaged in buying oil and shipping it through their pipes; in other words, were doing in reality a common carrier business, disguised, it may be, in form, but not changed in substance. Under these conditions I do not see how it would be possible to avoid the conclusion which the court has reached without declaring that the shadow and not the substance was the criterion to be resorted to for the purpose of determining the validity of the exercise of legislative power.

[1] The opinion of Mr. Justice HOLMES for the court and that of Mr. Justice MCKENNA dissenting are omitted. — ED.

CHAPTER II.

EXTENT OF PUBLIC PROFESSION.

GISBOURN *v.* HURST.

COMMON BENCH, 1710.

[1 *Salk.* 249.]

IN trover upon a special verdict the case was, the goods in the declaration were the plaintiff's, and by him delivered in London to one Richardson, to carry down to Birmingham. This Richardson was not a common carrier, but for some small time last past brought cheese to London, and in his return took such goods as he could carry back in his wagon into the country for a reasonable price. When he returned home, he put his wagon with the cheese into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house; and it was agreed *per Cur.*, that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a farther consideration, and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier, and the case in Cro. El. 596 is stronger. Two tradesmen brought their wool to a neighbor's beam, which he kept for his private use, and it was held that could not be distrained.[1]

[1] *Vide* Francis *v.* Wyatt, 3 Bur. 1489, 1 Bl. 483, in which it was determined, that a carriage standing at livery is not exempt from distress. In the former report the general doctrine upon the subject is very fully discussed.

GORDON *v.* HUTCHINSON.

SUPREME COURT OF PENNSYLVANIA, 1841.

[1 *W. & S.* 285.]

ERROR to the Common Pleas of Centre County.

This was an action on the case by James B. Hutchinson against James Gordon. The defendant pleaded *non assumpsit.*

The facts were that the defendant, being a farmer, applied at the store of the plaintiff for the hauling of goods from Lewistown to Bellefonte, upon his return from the former place, where he was going with a load of iron. He received an order and loaded the goods. On the way the head came out of a hogshead of molasses, and it was wholly lost. In this action the plaintiff claimed to recover the price of it. There was much proof on the subject of the occasion of the loss: whether it was in consequence of expansion of the molasses from heat, or of negligence on the part of the wagoner, of which there was strong evidence.

The defendant took the ground that he was not subject to the responsibilities of a common carrier, but only answerable for negligence, inasmuch as he was only employed occasionally to carry for hire. But the court below (Woodward, President) instructed the jury, that the defendant was answerable upon the principles which govern the liabilities of a common carrier.

Blanchard, for plaintiff in error, argued the same point here, and cited in support of it 2 Kent's Com. 597; Story on Bail. 298; 2 Lord Raym. 909; 2 Marsh, 293; Jones on Bail. 306; 5 Rawle, 188; 1 Wend. 272; Leigh N. P. 507; 2 Salk. 249; 2 Bos. & Pul. 417; 4 Taunt. 787.

Hale, for defendant in error, cited 4 N. H. 306; Bul. N. P. 7; 1 Salk. 282; 1 Wils. 281; Story on Bail. 325; 2 Watts, 443.

The opinion of the court was delivered by

GIBSON, C. J. The best definition of a common carrier in its application to the business of this country, is that which Mr. Jeremy (Law of Carriers, 4) has taken from Gisbourn *v.* Hurst, 1 Salk. 249, which was the case of one who was at first not thought to be a common carrier only because he had, for some small time before, brought cheese to London, and taken such goods as he could get to carry back into the country at a reasonable price; but the goods having been distrained for the rent of a barn into which he had put his wagon for safe keeping, it was finally resolved that any man undertaking to carry the goods of all persons indifferently, is, as to exemption from distress, a common carrier. Mr. Justice Story has cited this case (Commentaries on Bailm. 322) to prove that a common carrier is one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice.* My conclusion

from it is different. I take it a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true the court went no further than to say the wagoner was a common carrier as to the privilege of exemption from distress; but his contract was held not to be a private undertaking as the court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier: indeed they are correlative, and there is no reason why he should enjoy the one without being burdened with the other. Chancellor Kent (2 Commentaries, 597) states the law on the authority of Robinson *v.* Dunmore, 2 Bos. & Pul. 416, to be that a carrier for hire in a particular case, not exercising the business of a common carrier, is answerable only for ordinary neglect, unless he assume the risk of a common carrier by express contract; and Mr. Justice Story (Com. on Bail. 298) as well as the learned annotator on Sir William Jones's Essay (Law of Bailm. 103 *d*, note 3) does the same on the authority of the same case. There, however, the defendant was held liable on a special contract of warranty, that the goods should go safe; and it was therefore not material whether he was a general carrier or not. The judges, indeed, said that he was not a common carrier, but one who had put himself in the case of a common carrier by his agreement; yet even a common carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself answerable by a special agreement as well as on the custom. The question of carrier or not, therefore, did not necessarily enter into the inquiry, and we cannot suppose the judges gave it their principal attention.

But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly, than for the wagoners to lie by in Philadelphia for a rise of wages. In England the obligation to carry at request upon the carrier's particular route, is the criterion of the profession, but it is certainly not so with us. In Pennsylvania, we had no carriers exclusively between particular places, before the establishment of our public lines of transportation; and according to the English principle we could have had no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent. But the policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the

Pennsylvania wagoner was not always such even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance, or in the equipment of their teams from carriers by profession. I can readily understand why a carpenter, encouraged by an employer to undertake the job of a cabinetmaker, shall not be bound to bring the skill of a workman to the execution of it; or why a farmer, taking his horses from the plough to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than good faith; but I am unable to understand why a wagoner soliciting the employment of a common carrier, shall be prevented by the nature of any other employment he may sometimes follow, from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility. Now, what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him — there was nothing special in the case — on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but independent of that, we are of opinion that he is liable as an insurer.

Judgment affirmed.[1]

ALLEN *v.* SACKRIDER.

COURT OF APPEALS, NEW YORK, 1867.

[37 *N.* Y. 341.]

PARKER, J. The action was brought against the defendants to charge them, as common carriers, with damage to a quantity of grain shipped by the plaintiffs in the sloop of the defendants, to be trans-

[1] *Compare:* Fish *v.* Chapman, 2 Ga. 349; Parmalee *v.* Lourtz, 74 Ill. 116; Robertson *v.* Kennedy, 2 Dana, 430; Hanison *v.* Roy, 39 Miss. 396; Sanners *v.* Stewart, 20 Oh. St 69; Chevallier *v.* Straham, 2 Tex. 115. — ED.

ported from Trenton, in the province of Canada, to Ogdensburgh, in this State, which accrued from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: "The plaintiffs, in the fall of 1859, were partners, doing business at Ogdensburgh. The defendants were the owners of the sloop "Creole," of which Farnham was master. In the fall of 1859 the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiffs that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at one hundred dollars for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of $1,346.34; that the injury did not result from the want of ordinary care, skill, or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God. From these facts, my conclusions of law are, that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and, therefore, the plaintiffs have no cause of action against them."

The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers.

A common carrier was defined, in Gisbourn *v.* Hurst, 1 Salk. 249, to be, "any man undertaking, for hire, to carry the goods of all persons indifferently;" and in Dwight *v.* Brewster, 1 Pick. 50, to be, "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." In Orange Bank *v.* Brown, 3 Wend. 161, Chief Justice SAVAGE said: "Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." (Story on Contracts, § 752, *a.*) The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says

Prof. Parsons, "it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." (2 Pars. on Cont. [5th ed.] 166, note.)

The learned counsel for the appellant in effect recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says: "The 'Creole' was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly, they were not common carriers; and the judgment should, therefore, be affirmed.

All the judges concurring. *Judgment affirmed.*[1]

INGATE *v.* CHRISTIE.

QUEEN'S BENCH, 1850.

[3 *Car. & K.* 61.]

ASSUMPSIT. The declaration stated, that the defendant agreed to carry 100 cases of figs from a wharf to a ship, and that by the negligence of the defendant's servants the figs were lost. Plea: *non assumpsit.*

It was proved that, on the 14th of February, 1850, the defendant was employed by the plaintiffs, who are merchants, to take 100 cases of figs in his lighter from Mills' Wharf, in Thames Street, to the "Magnet" steamer, which lay in the River Thames, and that as the figs were on board the lighter, which was proceeding with them to the "Magnet," the lighter was run down by the "Menai" steamer and the figs all lost. It was proved that the defendant had a counting-house with his name and the word "lighterman" on the doorposts of it, and that he carried goods in his lighters from the wharves to the ships for anybody who employed him, and that the defendant was a lighterman and not a wharfinger.

ALDERSON, B. Everybody who undertakes to carry for any one who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a

[1] *Compare:* Bell *v.* Pidgeon, 5 Fed. 634; Crosby *v.* Fitch, 12 Conn. 410; Fish *v.* Clark, 49 N. Y. 122; Pennewell *v.* Cullen, 5 Harr. 238; Moss *v.* Bettes, 4 Heisk. 661; Spencer *v.* Daggett, 2 Vt. 92. — ED.

man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, "lighterman" painted at his door, and he offers to carry for every one.

ATLANTIC CITY *v.* FONSLER.

SUPREME COURT OF NEW JERSEY, 1903.

[56 *Atl.* 119.[1]]

GARRETSON, J. The power of Atlantic City to pass ordinances regulating the business of driving omnibuses, automobiles, or locomobiles, and fixing the fares to be charged, seems to be abundantly conferred by various statutes, viz.: By a supplement to the charter of Atlantic City, approved March 13, 1896; by another supplement approved March 22, 1871; and a general act applicable to all cities approved May 16, 1894, Gen. St. p. 2236, § 532; and we are unable to see that any of the regulations imposed by this ordinance are unreasonable. There is nothing unreasonable in requiring the driver of an omnibus, permitted by the city's license to run his vehicle on the public street, to carry all persons applying to him for passage and legally tendering the fare, as common carriers are required to do; and a further regulation, such as is made in this ordinance, which provides for a convenient notification to intending passengers that the vehicle is already in actual use, which provision seems to be as well for the convenience of the driver, has nothing unreasonable in it.

The judgment should be affirmed.[2]

[1] The statement of the ordinance in question requiring all licensed hackmen to accept passengers unless the sign "Engaged" was displayed is omitted from the opinion. — ED.

[2] *Compare:* Atlantic City *v.* Jehn, 69 N. J. L. 233. — ED.

GIBSON *v.* SILVA.

SUPREME COURT OF CEYLON, 1848.

[*Rama Nathan*, 105.]

OLIPHANT, C. J. The judgment and sentence of the police court are set aside. The question in this case is, did the defendant use a carriage for the conveyance for hire as a public business of any goods, or did he use a carriage for the conveyance for hire, *pro hac vice*, of any goods. If "as a public business" the defendant ought to have had a license; if *pro hac vice* none was required. A certain obscurity may have crept into the ordinance by reason of the words "as a public business" being only understood and not expressed after the words "conveyance for hire" in the 3rd line of the 6th section. If these words are not to be supplied in the 6th section, then the intention of the ordinance, as declared in the 2nd section, is completely altered, and every one hiring out his cart for a job, as to bring a load of bricks or remove earth from the foundation of a house, would be obliged to have a license, whereas the words used in the 2nd section are those constituting the definition of a common carrier in the English law. The defendant was a contractor with the superintendent of police to do a particular job, and he was not at the service of every individual who pleased to call upon him to carry for them, which is the case under certain restrictions with those who convey for hire as a public business, they being in fact carriers, and incurring the liabilities and responsibilities of that calling. Upon this ground the case is decided, but surely it is very questionable whether goods were carried. Can rubbish removed, to be shut out of the way or burnt, be called goods? Can a person carrying away a nuisance for which he receives a remuneration for his trouble be called a carrier? The court inclines to think these questions must be answered in the negative, but it serves no purpose to consider this point. The court is clear upon the other question.

SELF *v.* DUNN & BROWN.

SUPREME COURT OF GEORGIA, 1871.

[42 *Ga.* 528.]

McCAY, J. As a general rule, a ferryman is a carrier, and, under certain circumstances, he is a common carrier: Angell on Carriers, section 82. But a carrier is one who transports goods *for hire*: Revised Code, section 2039. A common carrier is one who pursues the business constantly or continuously, for any period of time or any distance of transportation: Code, section 2040. One who "pursues the business." What business? The business of carrying goods *for hire*. A carrier is bound to ordinary diligence. A common carrier can give no excuse for loss or damage but the act of God and the enemies of the State, and even then he must use extraordinary diligence: Revised Code, sections 2039, 2040. And this is but a restatement of the common law, by Jones, Story, Angell and other writers upon the subject. To make one a common carrier, he must be entitled, either by the bargain or by implication, to toll or hire.

This whole question, in a case very like this, in all its details, was before the Supreme Court of South Carolina, in the case of Littlejohn *v.* Jones, 2 McMullin's Reports, 366. That was a case of a ferry — a private ferry — used like this, as an appendage to a mill. There, however, it often happened that persons, other than customers to the mill, passed and paid ferriage; but it was understood that the payment was optional, and went to the servant, the main purpose of the ferry being to pass the customers to the mill. The Court held, in that case, that the mere fact that persons paid was not sufficient; the circumstances must be such, as that there is either an express or an implied promise to pay. The use of it, as an appendage to the mill, did not alter the case.

The ferryman, in this case, was a mere *mandatory*, a bailee, not for hire, and is only liable for gross negligence: Revised Code, § 2078. This was not even a chartered ferry, but a simple accommodation of the mill-owner to his customers. It is very subtle reasoning to say that the increased custom to his mill was his compensation. But one rarely does any act of favor to others that does not, at length, repay him. Is it fair to call that hire? We have given a good deal of search to find a case where such incidental benefits, coming to a mandatory, have been held to change his character and make him a bailee for hire, but have found none.

We think the charge was wrong on this point. The defendant was only liable for gross neglect, unless he was in the habit of charging toll: Revised Code, section 544. *Judgment reversed.*

ROBERTSON & CO. *v.* KENNEDY.

COURT OF APPEALS, KENTUCKY, 1834.

[2 *Dana* 430.]

NICHOLAS, J. Robertson & Co. sued Kennedy, in case, for the loss of a hogshead of sugar, which he, as a common carrier, had undertaken, for a reasonable compensation, to carry from the bank of the river, to their store in Brandenburgh.

On the trial, plaintiffs introduced proof conducing to show that defendant had been in the habit of hauling for hire, in the town of Brandenburgh, for every one who applied to him, with an ox team, driven by his slave; that he had undertaken to haul for plaintiffs the hogshead in question, and that, after defendant's slave had placed the hogshead on a slide, for the purpose of hauling it to plaintiff's store in Brandenburgh, the slide and hogshead slipped into the river, whereby the sugar was spoiled. They then moved the court to instruct the jury, in substance, that if they believed this proof the defendant was responsible for the loss of the sugar, unless it had occurred from inevitable accident, or the act of God. This instruction the court refused to give; but instructed the jury that defendant was responsible, if the sugar was lost through negligence, or from want of reasonable care.

The law is as contended for by the plaintiffs. Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is immaterial. The law imposes upon a common carrier the responsibility of an insurer, which requires a safe delivery at all events, unless prevented by public enemies, or such inevitable accident as lightning, tempests and the like, which are usually termed the acts of God.

The court erred in refusing the second instruction asked by the plaintiffs.

Judgment reversed, with costs, and cause remanded with instructions for a new trial, and further proceedings consistent herewith.[1]

[1] See *accord:* Jackson A. I. Wks. *v.* Hurlbut, 158 N. Y. 34. — ED.

FAUCHER *v.* WILSON.

SUPREME COURT OF NEW HAMPSHIRE, 1895.

[68 *N. H.* 338.[1]]

CHASE, J. It is not found that the defendant was a common carrier. The finding, that he was engaged in the business of trucking goods for hire from the railway freight station to different stores in the city, lacks the distinguishing characteristic of a common carrier, namely, the holding of oneself out as ready "to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow." Sheldon *v.* Robinson, 7 N. H. 157, 163; Elkins *v.* Railroad, 23 N. H. 275; Moses *v.* Railroad, 24 N. H. 71, 80, 88, 89; McDuffee *v.* Railroad, 52 N. H. 430, 448; State *v.* Express Co., 60 N. H. 219, 261; 2 Kent, 597, 598; Sto. Bailm., §§ 495, 508; Brind *v.* Dale, 8 C. & P. 207; Liver Alkali Co. *v.* Johnson, L. R. 9 Exch. 338, 343; Scaife *v.* Farrant, L. R. 10 Exch. 358, 365; Nugent *v.* Smith, 1 C. P. Div. 423; Fish *v.* Chapman, 2 Kelly (Ga.), 349; Allen *v.* Sackrider, 37 N. Y. 341; Lough *v.* Outerbridge, 143 N. Y. 271, 278. The inference from this finding is as strong, to say the least, that the defendant's business was limited to trucking for particular customers, at prices fixed in each case by special contract, as it is that he held himself out as ready to truck for the public indiscriminately at reasonable prices. If such was the character of his business, he was not an insurer of the plaintiff's goods, — there being no special contract of insurance, — and was only bound to exercise ordinary care in respect to them.[2]

[1] Only one point is printed. — ED.

[2] See *accord:* Scaife *v.* Farrant, L. R. 10 Exch. 358. — ED.

FAY *v.* PACIFIC IMPROVEMENT COMPANY.

SUPREME COURT OF CALIFORNIA, 1892.

[93 *Cal.* 253.]

DE HAVEN, J. — The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property needed for her personal use consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor.

The court below found that the Hotel Del Monte was, at the date named, a public inn, and that plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause, for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation, — a hotel. In Wintermute *v.* Clark, 5 Sand. 247, an inn is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in Pinkerton *v.* Woodward, 33 Cal. 596. The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding-house. This difference is thus stated in Schouler on Bailments: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode." (Schouler on Bailments, 253.)

We think the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the

hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of a hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper. (Krohn *v.* Sweeney, 2 Daly, 200.) Nor was the force of this evidence in any wise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it.

"Modes of entertainment alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn, the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment." (Schouler on Bailments, 249.)

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room, she ascertained what she would have to pay for the room and board is not sufficient of itself to show that she was not received as a guest. (Pinkerton *v.* Woodward, 33 Cal. 597; Hancock *v.* Rand, 94 N. Y. 1, 46 Am. Rep. 112; Jalie *v.* Cardinal, 35 Wis. 118; Hall *v.* Pike, 100 Mass. 495; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417.)

The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. (Hall *v.* Pike, 100 Mass. 495.) Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the East. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn."

In this case, the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts, the defendant is liable. (Hulett *v.* Swift, 33 N. Y. 571; 88 Am. Dec. 405.) A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. (1 Am. & Eng. Ency. of Law, 174.) A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency. (Miller *v.* Steam Nav. Co., 10 N. Y. 431; Chicago, etc. R. R. Co., *v.* Sawyer, 69 Ill. 285; 18 Am. Rep. 613.)

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily, must, when not actually upon her person, be deposited with the innkeeper, in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession.

"The guest may retain personal custody of his goods within the inn, — as of his trunk and its contents, his wearing apparel, and other articles in his room, and any jewelry or valuables carried or worn about his person, — without discharging the innkeeper from responsibility." (Jalie *v.* Cardinal, 35 Wis. 126.)

We have examined the other points made by appellant, but do not think they call for special discussion.

The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere, and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability in this respect is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges.

Judgment and order affirmed.[1]

[1] *Accord:* Pinkerton *v.* Woodward, 33 Cal. 557 (1867); Walling *v.* Potter, 35 Conn. 183 (1868); Bullock *v.* Adair, 63 Ill. App. 30 (1895); Lyon *v.* Smith, Morris, 184 (1843); Kisten *v.* Hildebrand, 9 B. Mon. 72 (1848); Johnson *v.* Chadbourne Finance Co., 89 Minn. 310 (1903); Wintermute *v.* Clarke, 5 Sandf. 242 (1851); State *v.* Mathews, 2 Dev. & B. 424 (1837), 4 Humph. 19 ( ); Thompson *v.* Lacy, 3 B. & Ald. 283 (1820).

HOWTH *v.* FRANKLIN.

SUPREME COURT OF TEXAS, 1858.

[20 *Tex.* 798.]

ROBERTS, J. The Court charged the jury, that "the material question in this case is whether or not the defendant is liable as the keeper of a common inn. An innkeeper is one who holds himself out to the public as engaged in the business of keeping a house for the lodging and entertainment of travellers and passengers, their horses and attendants, for reasonable compensation. He is liable for any loss of property committed to his keeping, which any care or vigilance or diligence on his part could have prevented. If the defendant only occasionally entertained travellers for compensation, when it suited his pleasure to do so, and did not hold himself out to the public as the keeper of an inn, or house for the accommodation of the travelling public, then the defendant was only bound to take that ordinary care of property committed to his keeping, that a prudent man usually takes of his own property, of the same kind; and he would not be liable for a loss, unless it was shown that he had failed to use ordinary diligence in the care of the property committed to him."

By the facts as presented in the record, there can be no dispute about anything but as to whether or not Howth was an innkeeper. The diligence used was ordinary, but not extreme; and therefore, if he were an innkeeper, he was liable. When property, committed to the custody of an innkeeper by his guest, is lost, the presumption is that the innkeeper is liable for it; and he can relieve himself from that liability by showing that he has used extreme diligence. What facts will excuse him is a question perhaps not very well settled; but it is well settled that he cannot excuse himself without showing that he has used extreme care and diligence in relation to the property lost. (Edwards on Bailments, 406; 2 Kent, Com. 592.)

The charge of the Court then was correct, in reference to the facts of this case, both as to what constitutes an innkeeper, and as to his liability. Had the facts shown that more than ordinary diligence was used in taking care of the horse, which was lost, then it might have been required of the Court to have been more specific in the charge, as to what facts would excuse an innkeeper, and as to what is meant by extreme diligence under the circumstances.

A person may hold himself out to the public as an innkeeper, by his acts, as well as by his declarations, or by a sign. (Edwards on Bailments, 388.) His acts might also force that conclusion, even against his declarations. To such conclusion must the jury have come in this

case. That was the question really at issue, and most prominently and fairly presented to them by the Court. The record shows that on the one hand, his house was on a public road and much visited by travellers, who were uniformly taken in, entertained and charged; and that it was well known as a place where entertainment was usually obtained for travellers; on the other hand, his frequent declarations that he did not keep a tavern, his refusal to take boarders, and entertaining his neighbors and countrymen frequently free of charge. Here is presented a conflict in the testimony, leading to different conclusions, which it is peculiarly the province of the jury to judge of and determine upon.

There are numerous farmers situated on the public roads of the country, who occasionally, and even frequently, take in and accommodate travellers, and receive compensation for it, who are not innkeepers, and are not liable as such. It is not their business or occupation, nor do they prepare and fit up their establishments for it. They yield to the laws of hospitality, in receiving and entertaining the stranger and the traveller, yet they cannot afford to do so without some compensation. This view of the subject the Court also presented to the minds of the jury, by telling them in substance, that if defendant only occasionally entertained travellers for compensation, when it suited his own pleasure, he did not thereby become an innkeeper.

The question then, of whether he was an innkeeper or not, having been fully and fairly presented to the jury, and the evidence on that subject being conflicting, the verdict of the jury will not be disturbed. The evidence in favor of Howth on this issue is strong; and had the verdict been in his favor, it would not have been disturbed.

There is even, as the facts appear to this Court, a preponderance in his favor, though not to that extent that would enable us to say that the verdict is certainly wrong; and therefore it must stand.[1]

Judgment affirmed.

[1] *Accord:* Beall *v.* Beck, Fed. Cas. 1161, ( ); Bonner *v.* Welborn, 7 Ga. 296, (1849); Southward *v.* Myers, 3 Bush. 681 (1868); Holstein *v.* Phillips, N. C. , 59 S. E. 1037 (1907); Commonwealth *v.* Cuncannon, 3 Brewst. 344 (1869); Howth *v.* Franklin, 20 Tex. 798, 73 Am. Dec. 218 (1858); Clary *v.* Willey, 49 Vt. 55 (1875).

BRIDAL VEIL LUMBERING COMPANY *v.* JOHNSON.

SUPREME COURT OF OREGON, 1896.

[30 *Oreg.* 205.]

BEAN, J. 1. There being no bill of exceptions in the record, the only question for our determination is whether the findings of fact support the judgment. The right of eminent domain is a right of sovereignty, and can be exercised only by legislative authority, and for a public use or benefit. When, therefore, a particular corporation claims the right to take private property without the consent of the owner, it must show not only a legislative warrant, but if its right is challenged on that ground, it must be able to establish the fact that the enterprise in which it is engaged is one by which a public use or benefit is to be subserved or promoted, so that such taking can be said to be for a public and not a private use. The necessity or expediency of taking private property for public use, the instrumentalities through which it may be done, and the mode of procedure, are legislative and not judicial questions. But, whether the proposed use thereof is in fact public, so as to justify its taking without the consent of the owner, has always been a question for the courts to determine, and, in doing so, they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation, but may resort to evidence *aliunde* showing the actual business proposed to be conducted by it: Lewis on Eminent Domain, § 158; Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 375 (15 N. E. 429); Chicago & E. I. R.R. Co. *v.* Wiltse, 116 Ill. 449 (6 N. E. 49).

2. Now, in this case, from the findings of fact, it clearly appears that plaintiff is a corporation organized for the construction of a railroad for the transportation of freight and passengers, and therefore sections 3239 and 3240, Hill's Code, invest it with authority to exercise the power of eminent domain, if the use it intends to make of the property sought to be taken is in fact public. Bearing upon this question, the findings are that it has already constructed five and a half miles of road, and is now and has been operating the same for the use and benefit of the general public in carrying freight and passengers, and there is nothing in the record anywhere to indicate that the road has ever been used or is intended to be used for any other or different purpose, or that it was built or intended for a logging road, or has ever been used for that purpose; or, in fact, that it is in any way connected with or a part of the mill enterprise; or, indeed, except by inference, that it belongs to the mill company. We are, therefore, unable to say that the court was in error in holding that the railroad of plaintiff is public so as to justify the exercise in its behalf of the power of eminent domain. The fact

that it has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city, or settlement, or other railroad at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway for the use of the public in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised: De Camp *v.* Hibernia Railroad Co., 47 N. J. Law, 43; Phillips *v.* Watson, 73 Iowa, 28 (18 N. W. 659); Ross *v.* Davis, 97 Ind. 79.

If every one having occasion to use the road as a passenger or for transportation of freight may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment. In doing so, however, we do not desire to be understood as holding that a railroad constructed by a mill company for the evident purpose of transporting logs to its mill can become a public highway, so as to justify the exercise of the power of eminent domain in its behalf, because of any declaration in its articles of incorporation to that effect, or on account of any right of the public to use it for the transportation of freight and passengers. No such question is presented by this record. The findings of the court by which we are bound negative such an inference, and this decision is based upon the facts as found by the court below. The judgment must therefore be affirmed.[1] *Affirmed.*

[1] As to public railways, see: Butler *v.* Tifton Ry. Co. 121 Ga. 817 (1904); Phillips *v.* Watson, 63 Iowa, 28 (1884); Louisville, etc. R.R. Co. *v.* Pittsburg & K. Coal Co., 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601 (1901); Ulmer *v.* Lime Rock R.R. Co., 98 Me. 579, 57 Atl. 100 (1904); New Central Coal Co. *v.* George's Creek C. & I. Co., 37 Md. 537 (1872); Kettle River R.R. Co. *v.* Eastern Ry. Co., 41 Minn. 461; Dietrich *v.* Murdock, 42 Mo. 279 (1868); Butte, A. & P. Ry. Co. *v.* Montana Union Ry. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298 (1895); Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. Rep. 818, 34 L. R. A. 368 (1896); Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385 (1901).

MATTER OF THE SPLIT ROCK CABLE ROAD COMPANY TO ACQUIRE REAL ESTATE OF CHARLES HUGHES ET AL.

COURT OF APPEALS OF NEW YORK, 1891.

[128 *N. Y.* 408.[1]]

O'BRIEN, J. The map of its route originally filed, taken in connection with the evidence, shows that the southern terminus of the tramway is upon the land of the petitioner and near the establishment of the Solvay Process Company, a corporation engaged in a large and growing business, consisting, as is to be inferred from the evidence, in the production of soda ash. This company owns one hundred acres of land upon which are stone quarries, and this land entirely surrounds the terminus of the tramway as well as the land in question. The northern terminus of the tramway as now built is also on the lands of the Solvay Process Company at the lime-kiln of their works, about 500 feet from the Erie canal. The incorporators of the petitioner were practically all stockholders and persons interested in the Solvay Company, and it is quite apparent that the petitioner was organized and is operated as an instrumentality to facilitate the business operations of the Solvay Company. The only business that it has thus far carried on was for that company. As now constructed the limit of its carrying capacity cannot exceed 750 tons per day. It has thus far been operated practically night and day, and has succeeded in carrying for the Solvay Company 350 to 400 tons of stone a day. There is no public highway leading to the northern terminus of the road by means of which the public can obtain access for its use; that the road has thus far been entirely for the benefit of the Solvay Company, and that its business is to be entirely subordinate in the future to the plans and interests of the same company is entirely clear. From the evidence of the president of the petitioner and other witnesses in support of the application the most that is claimed is that the surplus of the capacity of the road, after supplying the wants of the Solvay Company, is to be devoted to public use in carrying, in buckets, freight offered to it by any person, providing such freight is suitable to the buckets and the road. Whether there is to be any surplus capacity as the Solvay Company continues to expand its business, and, if so, how much, are questions which are left entirely uncertain. From the testimony, it appears that the lands are required in order to increase the terminal

[1] The first part of the opinion largely devoted to the recital of the legislation purporting to authorize companies constructing cable tramways to condemn lands is omitted. — ED.

facilities of the tramway company by building other tramways on the surface to facilitate the carrying of stone to the cable station, by erecting buildings for the storage of freight and for repair shops, and to furnish means of access. The company has other lands that could be used for these purposes, but it is not so convenient. The evidence does not suggest any business that the petitioner is to carry on in the future any more than in the past, beyond the carrying of stone for the Solvay Company, except, possibly, the carrying of coal. In regard to that, it is best to describe the project in the language of the president himself, who said: "We intend to make a contract with some private individual to furnish him with coal, so that he can transport it or sell it to people in that vicinity; to establish a coal yard the same as anywhere, not that the Solvay Process Company or the cable company will establish a coal yard; some individual will have to run it, with whom we will make a contract to carry coal, and we propose to limit the contract to one individual for the present." Looking at the statute under which the petitioner was incorporated, the object of its incorporation as described in the certificate and the evidence in regard to the manner in which it has been and is to be operated and the purpose of its corporate existence, we think it is entirely clear that the use to which the petitioner is to devote the lands of the respondents is not public, but private. The principles governing applications by corporations of this character to take private property for its corporate purposes, have been very fully discussed and stated in a recent case in this court. (Matter of Niagara Falls & Whirlpool Ry. Co., 108 N. Y. 375.) Under the doctrine of this and other cases, a possible limited use by a few, and not then as a right but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner. (Matter of Deansville Cemetery Assn., 66 N. Y. 569; Matter of Eureka Basin, Warehouse & M. Co., 96 id. 42; Matter of Rochester, Hornellsville & Lack. R. Co., 110 id. 119; Matter N. Y., L. & W. Ry. Co., 99 id. 12.) The order appealed from is right, and should be affirmed, with costs. All concur. Order affirmed.[1]

[1] As to private railways, see: Wade *v.* Lutcher & Moore Lumber Co., 74 Fed. 517 (1896); Weidenfeld *v.* Sugar Run Ry., 48 Fed. 615 (1892); Albion Lumber Co. *v.* De Nobra, 72 Fed. 739 (1896); *contra* Costa R. R. Co. *v.* Moss, 23 Cal. 323 (1863); White *v.* Kennon & Co., 83 Ga. 343 (1889); Normandale Lumber Co. *v.* Knight, 89 Ga. 111 (1892); Garbutt Lumber Co. *v.* Georgia &c. Ry., 111 Ga. 714 (1900); Litchfield & M. Ry. Co. *v.* The People, 222 Ill. 242 (1906); Williams, *et al. v.* Judge, 45 La. Ann. 1295 ( ); Kettle River R. R. Co. *v.* Eastern Ry. Co., 41 Minn. 461 (1889); Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167 (1903); Cozard *v.* Hardwood Co., 139 N. C. 283 (1905).

HAUGEN *v.* ALBINA LIGHT AND WATER CO.

SUPREME COURT OF OREGON, 1891.

[21 Ore. 411.[1]]

THIS is an action for a writ of mandamus to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook Street, and allowing him to connect a service-pipe therewith, &c. The facts alleged in substance are these: That the defendant is a corporation, the business of which, among other things, is to furnish the city of Albina, and the inhabitants thereof, with water; that it is operating under a franchise granted to said company by the council of the city of Albina, by virtue of an ordinance, as follows: "An ordinance granting the right of way through the streets for laying pipes for the purpose of conveying water through the city. The city of Albina does ordain as follows: Section 1. That the Albina Water Company, its successors and assigns, be and are hereby granted the right and privilege of laying pipes through the streets of the city of Albina, for the purpose of conducting water through the city. Section 2. That the ditches for laying pipes shall be sunk two feet, and the pipes for conducting the water shall be under the surface or level of the established grade eighteen to twenty inches on all improved streets, and no pipe shall be laid so as to interfere with the construction of sewers; provided, that nothing in this ordinance shall be construed so as to grant any exclusive right or privilege of conducting water into the city; provided further, that said water company shall in no case charge more than one dollar per month for the first faucet and fifty cents for each additional faucet in the same building, for family use or at a private dwelling house," &c. That the purpose and object of granting to said company the right to lay water-mains in the streets of said city, was that the citizens of said city might be furnished with a supply of pure and wholesome water; that by virtue of the authority conferred by said ordinance, the defendant laid down a four-inch water-main in and through Tillamook Street in the then city of Albina, from the east line of the original townsite of the city of Albina, to the west line of Twenty-fourth Street in Irvington, and connected the said main with the main on Margaretta Avenue in said city, and for nearly a year past has been pumping water and conducting it through said main on Tillamook Street to supply the citizens of Irvington residing east of Fourteenth Street; that the defendant utterly refuses to allow persons residing on Tillamook Street between the east line of the original townsite of Albina and Fourteenth Street in Irvington, to tap said main, and refuses to supply them with water therefrom; that the plaintiff resided on Tillamook Street between the points above named, and is the owner

[1] This case is abridged. — ED.

of lot 2, block 126, of Irvington; that said lot abuts on said Tillamook Street, and the plaintiff is constructing a dwelling thereon, and is desirous of securing a supply of water from the water-mains of said street, that being the only source of water supply for said premises; that the plaintiff has repeatedly requested the defendant to supply him with water from said main, but has always been refused; that on the eleventh day of July the plaintiff tendered said defendant two dollars and fifty cents, the regular fee charged by the defendant for tapping a water-main with a service pipe, and demanded from the defendant to be connected with said water-main in Tillamook Street, and to be supplied therefrom with water, and that said defendant refused to accept said tender, and refused to connect the plaintiff's premises with said main, and refused to supply him with water therefrom; that said refusal is wilful, and is done for the avowed purpose of debarring the residents on said Tillamook Street, between the original townsite of Albina and Fourteenth Street, and particularly the plaintiff, from the use of water from said main; that the plaintiff is without any legal remedy in the premises except the writ of mandamus, etc.

LORD, J. From this statement of the case, as presented by the pleadings, the court below held that when the defendant entered upon, and laid down its water-mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water.

The contention for the defendant is, that the ordinance does not impose the duty upon it to furnish water, but only if it shall furnish water, that the charge therefor shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets, for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers, but that it contains no provision requiring it to supply the city or its inhabitants with water, hence the ordinance imposes no duty upon the company to furnish water to any one.

In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and its inhabitants with water, and that the city by its ordinance granted it the right to lay water-mains through its streets for the purpose of carrying into effect the objects of its incorporation, it insists that the ordinance is the measure of the rights conferred and the obligation imposed, which, by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed, without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitant of the city with water." . . .

It must then be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right

to dig up the streets, and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the State, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipes therein for conducting or distributing water for public and private use. It was not organized to lay pipes, but to supply water, and the grant was to enable it to do so and thereby effect the public purpose contemplated.

When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water, except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as VAN SYCKEL, J., said, "is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."

We discover no error, and the judgment must be affirmed for the plaintiff, making the writ peremptory.

SLOSSER *v.* SALT RIVER VALLEY CANAL CO.

SUPREME COURT OF ARIZONA, 1901.

[65 *Pac. Rep.* 332.[1]]

SLOAN, J. . . . The proof shows that plaintiff and his grantors have cultivated the land which he now owns from 1871 to 1880, under various canals in which plaintiff and his grantors were the owners of water rights. Since 1880, with the exception of one or two years, whatever water plaintiff has had for the irrigation of his land has been obtained from the Salt River Valley canal. The circumstances under which plaintiff changed his use from the Farmers' canal to the Salt River Valley canal are shown to have been the difficulty of maintaining the Farmers' canal, and the scarcity of water at its head, due to the diversion by the defendant company and other companies owning canals which headed further up the river. It is contended by the defendant that the abandonment of the Farmers' canal by its water-right holders, including the plaintiff, operated as an abandonment of their appropriations of water. Whatever may be the status of other water-right holders in the Farmers' canal, the defendant company, as late as 1890, in the suit known as "Wormser against the Salt River Valley Canal Company," tried in the court below, which case involved the rights of various canals in the Salt River Valley to divert the water from Salt River, acknowledged plaintiff's right as an appropriator of water, by setting up such right, introducing proof to the same, and obtaining an adjudication in its favor, sustaining its right to divert and carry water necessary for the irrigation of plaintiff's lands. If plaintiff had not lost his right as an appropriator of water by obtaining water from the Salt River canal from 1880 to 1890, it cannot be very well contended that under the same circumstances his right was lost to him between 1890 and 1896, when he was first denied the right of obtaining water from the defendant's canal. Forfeitures are not favored in law, and we hold, therefore, that the circumstances under which plaintiff ceased to obtain water from the Farmers' canal, and his use of water from the defendant's canal, coupled with the acknowledgment as late as 1890 by the defendant company of his right as an appropriator, do not show such forfeiture, but, on the contrary, establish his status as a valid appropriator of water from the Salt River. We do not hold that the plaintiff has acquired any contractual right to the service of said company which would entitle him to compel from said company the delivery of water for the irrigation of his lands, by virtue of such contractual relation, whenever the company confines its diversion and delivery of water to its stockholders to be used by the latter upon lands

[1] This case is abridged. — ED.

owned or possessed by them. On the other hand, we hold that his rights in the premises, so far as the defendant company is concerned, rest upon the fact that the defendant was not, at the time of plaintiff's application for water, confining its service to supplying its water-right holders for the irrigation of lands which they owned or possessed. In determining, however, whether plaintiff, as against others similarly situated, so far as the company is concerned, was entitled to the service of the company, under the law of prior appropriation, and the duty of water companies which occupy the relation of public agency in the diversion and carriage of water, we must look to the date of his appropriation, and therefore his priority of right. We think the denial by the defendant of plaintiff's application, under the circumstances shown by the record, was unwarranted, and he should have been accorded this right in preference to the holders of leases from the shareholders for use upon lands not owned or possessed by said shareholders, who were subsequent appropriators.

The importance of the questions presented by the record is such that we feel called upon to define with certainty the position we have taken, and to this end to give a brief résumé of the points decided, with a statement of those which we do not decide, which grow out of a consideration of the points decided in a collateral way, although not necessary in arriving at the result reached: We hold that the ownership and possession of arable and irrigable land are essential, under the statutes, for the acquisition of the right of appropriation of water from a public stream for purposes of irrigation. We hold that a corporation not the owner or possessor of arable and irrigable land may lawfully construct a dam, canal, or other conduit of water, and divert from such stream water for purposes of irrigation, but that in so doing it becomes in no sense an appropriator or owner of the water so diverted. Its status is that of either a private or public agency, depending upon whether its diversion is for the purpose of supplying owners or possessors of arable and irrigable land with whom it has fixed contractual relations, binding it to perform such service, or whether its purpose or practice be to supply owners or possessors of such land who are not its water-right holders, or with whom it has not bound itself by contract to permanently render such service. If it confines its service as the private agent of certain appropriators, it cannot be compelled to render service to others. On the other hand, if it undertakes to and does divert and carry water for the use of consumers with whom it is not bound by such contracts, and hence becomes a public agency, it cannot, under the law, discriminate by giving preference otherwise than with due regard to priority of appropriation. We further hold that a shareholder in such a company, who is also a water-right holder by virtue of his ownership of such share of stock and the ownership or possession of arable and irrigable land irrigated by means of such water right, may not assign such water right to another, to be used upon lands which the assignor does not own or possess, for any particular season, so as to

confer upon the assignee his priority of right, and that such company does not possess the right to discriminate in favor of such holders, as against other appropriators of water under its canal, who were prior in right. In other words, a water right, to be effective, must be attached to and pertain to a particular tract of land, and is in no sense a "floating" right. We do not wish to be understood as holding that a water right which is so attached becomes inseparable from such land. That is to say, we do not hold that a prior appropriator of water may not convey his prior appropriation to another, without the land, so as to confer upon his vendee of such water right all the rights which the vendor may possess, provided such vendee makes a beneficial use of such water right upon lands which he owns or possesses. But we desire to be understood simply as holding that, so long as a water right is attached to a particular piece of land, it cannot be made to do duty to such land, and as well to other land not owned or possessed by such water-right holder, at the will or option of the latter. In the briefs, as well as in the very able and elaborate argument made by counsel for appellee, the right of shareholders to do this, and the duty of the defendant company to recognize the right, have been strenuously argued. In this, however, we think counsel confuses the right of an appropriator to sell or transfer by conveyance his water rights to another with the assumed right in question. To recognize the right of a prior appropriator to lease his water right independent of his land would, as we conceive, be subversive of the underlying principle of our water-right law. The right of alienation of a water right is one which is based upon the general right of property, and arises out of the necessity, in order that injustice may not be done to the owner, of permitting such alienation, for the reason that it frequently happens, through no fault of the owner, and by the operation of natural laws, that land to which water rights have been attached becomes unsuitable for cultivation. Floods frequently wash away and destroy farming lands, or leave deposits of coarse gravel and bowlders upon them; and other natural causes frequently render such lands not only unprofitable, but impossible of irrigation and cultivation. Natural justice, therefore, is subserved by recognizing the right of a water-right holder to change his appropriation, under such circumstances, to lands capable of profitable cultivation, or to sell his right to another, to be used by the latter for a beneficial use recognized by the statute. As the law must be certain and general in the matter of the right of conveyances, to admit the right of alienation under some circumstances must be the admission of that right under any and all circumstances. There was no principle of natural justice or of necessity that required the recognition of the right of a water-right holder to lease his water right for particular seasons, while retaining the land to which it is attached; for so long as he may use his right in the cultivation of such land he enjoys all that the law confers in the first instance by virtue of his appropriation. In considering our peculiar statutes, it is well to bear in mind the fact

that the only expression in our statutes upon the subject of priority of rights among appropriators from a common source for agricultural purposes is found in paragraph 3215 of the Revised Statutes, which reads: "That during years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors, the oldest titles shall have precedence always." And, while this section applies primarily to public acequias, it is significant, taken in connection with paragraph 3201, and negatives the idea that priority of appropriation is a mere personal right, which may be enjoyed otherwise than by its application upon particular lands. We hold further, therefore, that the defendant company, by adopting and continuing the practice of supplying water to others than its water-right holders owning or possessing arable and irrigable land, not being itself an appropriator of the water carried, or the owner thereof, and dealing, as it was, with public property, became a public agency to the extent that plaintiff at the time he made his application for water, although not a water-right holder of the company, was entitled, upon the payment of the charge for similar service made to other non-water-right holders, whether holders of orders from water-right holders or not, to have delivered upon his lands water sufficient for the irrigation thereof, in preference to other non-water-right holders whose appropriations were subsequent in time, and that he is entitled to this service upon the same terms and conditions, so long as the defendant company continues to supply water to consumers under its canal who are not its water-right holders, whether upon the order of the latter or not, and thus continues to assume the status of a public agency in the diversion and carriage of water. We do not hold that the water-right holders in the Salt River canal are upon a parity of right with appellant and other non-water-right holders similarly situated to the service of the canal and to the water it diverts and carries. We assert that the canal company owes a first duty to supply the needs and requirements of the water-right holders. It is the surplus water remaining in the canal after this is done which is lawfully available to the latter class, and which must be disposed of by the company in the manner herein decided. Under the circumstances shown by the record, we hold that the appellant was wrongfully denied water for the irrigation of his lands at the time he made his application, in May, 1899; it being shown that the appellee company during that season was engaged in supplying other consumers within the flow of its canal who were non-water-right holders, and thus, confessedly, was diverting and carrying water in its canal in excess of that needed and required by its water-right holders for the irrigation of lands to which their water rights were attached, and it being further shown that appellant had the superior right to the use of such surplus water over other non-water-right holders thus supplied, by virtue of his ownership and possession of lands having an older right of appropriation. We

further hold that, so long as appellant continues to be the owner or possessor of said lands, upon paying the usual and reasonable charge therefor, he is entitled to the same service, whenever and so long as the appellee company undertakes to and does divert and carry in its canal water from Salt River in excess of that needed and required by its water-right holders for the irrigation of lands owned or possessed by such water-right holders, and to which such water rights are attached. The judgment of the trial court is reversed, and a judgment and decree will be entered in consonance with this opinion.

DOAN, J., concurs.

DAVIS, J. I do not concur in the opinion of the court in this case.

ANONYMOUS.

KING'S BENCH, ENGLAND, 1690.

[2 *T. R.* 3.[1]]

PER CURIAM. An action lies against a common carrier for refusing to carry money, if he do not assign a particular reason for it.

[1] But see Citizen's Bank *v.* Nantucket St. Co., 2 Story, 16; Fay *v.* Stearnes New World, 1 Cal. 348; Mechanics Nt. Bk. *v.* Gordon, 5 La. Ann. 604; Pender *v.* Robbins, 6 Jones, 207. If, however, a regular profession has been made to carry valuables, it is common carriage. Hellman *v.* Holladay, 1 Woolw. 365; Kirkland *v.* Montgomery, 1 Swan, 452.

JOHNSON *v.* MIDLAND RAILWAY COMPANY.

COURT OF EXCHEQUER, ENGLAND, 1849.

[4 *Exch.* 367.[1]]

PARKE, B. They were not bound to carry the coal unless they had convenience for that purpose: Jackson *v.* Rogers, 2 Show. 327; and the evidence was, that they could not carry coal without giving up the passenger traffic. In order to entitle everybody to call upon them to carry coal from Melton Mowbray to Oakham, they must have publicly professed to do so. The question is irrespective of the Act of Parliament, which only enables them to be carriers, leaving them at liberty to exercise their common law right of carrying any particular description of goods only, from and to particular places.[2]

[1] In this interjection by Parke, B., at the argument all the points made in the final decision of the case were foreshadowed. — ED.

[2] *Accord:* Leonard *v.* American Express Co., 26 Upp. Can. Q. B. 533.

TUNNEL & SHORT *v.* PETTIJOHN.

SUPERIOR COURT OF DELAWARE, 1836.

[2 *Harv.* 48.]

CAPIAS CASE. The proof established that defendant was in the habit of hauling for hire, goods landed at Milton, belonging to merchants in Georgetown; but one of these merchants testified, that the defendant had refused to carry molasses for him on account of its bulk and weight, and that he had never known him to carry molasses. The hogshead in question was brought from Philadelphia, for Tunnel and Short, by Captain Parker, and delivered on the wharf at Milton; when, defendant's cart being there, it was placed by Parker's hands and defendant's servant in his cart. While placing it, the hogshead rolled and fell from the cart, and the contents were spilled upon the ground and lost.

The Court said, to enable the plaintiff to recover, he must prove either a special contract and undertaking by the defendant to carry this hogshead of molasses, or a general usage; that is, that the defendant was a common carrier of goods, including goods of this description. A general usage to carry goods other than molasses is proved in this case; but so far as there is proof of usage, it is against the idea of the defendant's general undertaking to carry molasses. And there seems to be good reason for distinguishing between this and other kinds of goods, on account of its bulk and weight, and it also appears that the defendant's cart is too small for such freight.

The other is a more difficult question, as to when the defendant's liability commenced, supposing him to be liable. Was the delivery to him complete, by showing him the hogshead on the wharf, or was the captain of the vessel bound to place it in the cart. But the point is unnecessary, as we are of opinion that the defendant is not liable, under the proof in the case, on the other ground.

Nonsuit ordered.

KANSAS PACIFIC RAILWAY COMPANY *v.* NICHOLS, KENNEDY & CO.

SUPREME COURT OF KANSAS, 1872.

[9 *Kans.* 235.[1]]

ACTION brought by Nichols, Kennedy & Co. to recover damages for cattle lost by the Railway Company alleging it to be a common carrier of cattle.

VALENTINE J. At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses. Funnel *v.* Pettijohn, 2 Harrington (Del.), 48. And it seems to us clear beyond all doubt, that if any person had in England prior to the year 1607 held himself out as a common carrier of cattle and live stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carried by common carriers, but it permitted all kinds of personal property to be so carried. At common law any person could be a common carrier of all kinds, or any kind, and of just such kinds of personal property as he chose, no more, nor less. Of course, it is well known that at the time when our common law had its origin, that is, prior to the year 1607, railroads had no existence. But when they came into existence it must be admitted that they would be governed by the same rules so far as applicable which govern other carriers of property. Therefore it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live stock, etc. In this state it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for if such were the case they would be carriers of but very few of the innumerable articles that are

[1] Only an extract is printed. — ED.

now actually carried by railroad companies. And it can hardly be supposed that they were created for the mere purpose of taking the place of pack-horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property. Our decision then upon this question is, that whenever a railroad company receive cattle or live stock to be transported over their road from one place to another such company assume all the reponsibilities of a common carrier except so far as such responsibilities may be modified by special contract.[1]

LEVI *v.* LYNN AND BOSTON RAILROAD CO.

SUPREME COURT OF MASSACHUSETTS, 1865.

[11 *Allen*, 300.[2]]

TORT against a street railway corporation to recover the value of a box of merchandise.

At the trial in the Superior Court, before BRIGHAM, J., the plaintiff introduced evidence tending to show that on the 8th of July, 1864, she placed upon the front platform of one of the defendants' cars in Boston a box of merchandise, and then took her seat within the car to go to Chelsea, and paid the conductor her fare and also a certain sum as compensation for carrying the box to Chelsea. She was also allowed to introduce evidence, under objection, tending to show that two other persons had at other times paid to conductors of the defendants' cars money for the conveyance of merchandise to Chelsea in addition to their own fare, with the knowledge of the superintendent of the railroad.

The above are all the facts recited in the bill of exceptions.

COLT, J. The plaintiff resorted to the usual and proper mode of proving that the defendants had assumed the business of common carriers of merchandise upon their cars, and produced evidence that two other persons had paid money at other times to the defendants'

[1] Everywhere in the United States carriage of cattle is considered common carriage except in Michigan. See Lake Shore & M.S. Ry. *v.* Perkins, 25 Mich. 329. — ED.

[2] This case is abridged. — ED.

conductors for the transportation of merchandise, with a knowledge of the superintendent of the road. For anything that appears to the contrary in the exceptions, it may have been proved that these two other persons had so employed the defendants in repeated instances. The evidence was entirely proper to go to the jury, and, in the absence of anything to control or contradict it, would be sufficient to warrant them in finding that the defendants had assumed to be and were common carriers, when the plaintiff's box was delivered to them for transportation.

The jury were in effect instructed that, if they found that the defendants were common carriers, and that the plaintiff's box was delivered to them for transportation, and the price of transportation paid by her, they would be responsible for the delivery of the box at its place of destination. And these instructions were sufficiently correct and accurate.

If the defendants were proved to be common carriers the law supplies the proof of the contract, so far as regards the extent and degree of liability, and, the bailor having proved delivery to a carrier and loss, the burden is on the carrier to discharge himself from liability, within the exceptions which the law creates. No question seems to have been raised or instructions required in regard to the limit of the defendants' liability in this case, if regarded as common carriers. Clark *v.* Barnwell, 12 How. 272; Alden *v.* Pearson, 3 Gray, 342.

The question whether the plaintiff was herself negligent, in placing her property on the front platform of the car, and the point that she did not in fact part with the custody of the box, and so cannot charge the defendants with her loss, are not open to the defendants upon these exceptions, for it does not appear that any such question was raised or point made at the trial. Brigham *v.* Wentworth, 11 Cush. 123; Reed *v.* Call, 5 Cush. 14; Moore *v.* Fitchburg Railroad, 4 Gray, 465.

Exceptions overruled.[1]

COUP *v.* WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.

SUPREME COURT OF MICHIGAN, 1885.

[56 *Mich.* 111.[2]]

CAMPBELL, J. Plaintiff, who is a circus proprietor, sued defendant as a carrier for injuries to cars and equipments, and to persons and animals caused by a collision of two trains made up of his circus cars, while in transit through Illinois. The court below held defendant to

[1] *Compare:* Knox *v.* Russ, 14 Ala. 249; Adams Express Co. *v.* Cressap, 6 Bush, 572; Clark *v.* Rochester, &c. R. R., 14 N. Y. 570; Spears *v.* Lake Shore & M. S. R. R., 67 Barb. 513; Kemp *v.* Coughton, 11 Johns. 107. — ED.

[2] Opinion only is printed. — ED.

the common-law liability of a common carrier and held there was no avoiding liability by reason of a special contract under which the transportation was directed. The principal questions raised on the trial arose out of discussions concerning the nature of defendant's employment, and questions of damage. Some other points also appeared. In the view which we take of the case the former become more important, and will be first considered.

Plaintiff had a large circus property, including horses, wild animals, and various paraphernalia, with tents and appliances for exhibition. He owned special cars fitted up for the carriage of performers and property, in which the whole concern was moved from place to place for exhibition.

The defendant company has an organized connection, under the same name, with railways running between Detroit and St. Louis, through Indiana and Illinois. On the 25th of July, 1882, a written contract was made at St. Louis by defendant's proper agent with plaintiff to the following effect. Defendant was to furnish men and motive power to transport the circus by train of one or more divisions, consisting of twelve flat, six stock, one elephant, one baggage, and three passenger coaches, being in all twenty-three cars from Cairo to Detroit with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition, leaving Cairo August 19, Delphi August 21, Columbia City August 22, exhibiting at Detroit August 23, and then to be turned over to the Great Western Transfer Line boats. Plaintiff was to furnish his own cars, and two from another company at Cairo, in good condition and running order. It was agreed that "for the use of the said machinery, motive power and men and the privileges above enumerated, plaintiff should pay $400 for the run to Delphi, $175 to Columbia City, and $225 to Detroit, each sum to be paid before leaving each point of departure."

It was further expressly stipulated that the agreement was not made with defendant as a carrier, but merely "as a hirer of said machinery, motive power, and right of way and the men to move and work the same; the same to be operated under the management, direction, orders, and control of said party of the second part [plaintiff] or his agent, as in his possession, and by means of said employes as his agents, but to run according to the rules, regulations, and time-tables of the said party of the first part."

The contract further provides that defendant should not be responsible for damage by want of care in the running of the cars or otherwise, and for stipulated damages in case of any liability. It also provided for transporting free on its passenger trains two advertising cars and advertising material.

The plaintiff's cars were made up in two trains at Cairo, and divided to suit instructions. The testimony tended to prove that two cars were added to the forward train by order of plaintiff's agent, but in the view we take the question who did it is not important. The forward train

was for some cause on which there was room for argument brought to a standstill, and run into by the other train, and considerable damage done by the collision.

Defendants insisted that plaintiff made out no case for recovery, and that the contract exempted them. Plaintiff claimed, and the court below held the exemption incompetent.

Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all.

The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars. It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies in their duty as common carriers to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.

The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which under any circumstances may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage.

The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions and not to suit the defendant's convenience. There was also a divided authority, so that while defendant's men were to attend to the moving

of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far in the absence of contract they would be liable in such a mixed employment where plaintiff's men as well as their own had duties to perform connected with the movement and arrangement of the business we need not consider.

It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in Mann *v.* White River Log & Booming Co., 46 Mich. 38, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage.

It is therefore needless to discuss the other questions in the case, which involve several rulings open to criticism. We think the defendant was not liable in the action, and it should have been taken from the jury and a verdict ordered of no cause of action.

The judgment must be reversed and a new trial granted.

The other justices concurred.

BIRMINGHAM WATER WORKS COMPANY *v.* BIRMINGHAM.

SUPREME COURT OF ALABAMA, 1912.

[176 *Ala.* 301.[1]]

SOMERVILLE, J.

Respondent has always adequately and satisfactorily supplied the people of Birmingham in general with wholesome water, and has failed to do so only as to the specified residence section on Red Mountain. This section is now thickly settled and built up with about 150 residences of the best type, occupied by about 750 people. Respondent's water mains run into this section, the city has placed about 25 fire hydrants there, and its sewer system has been extended through it, and the dwellings have been connected therewith. The mains are full of water; but, for lack of pressure, the water is unavailable for fire hydrants or sewerage and domestic purposes. Respondent has the money and means to erect a standpipe on Red Mountain, which will adequately supply water for these purposes, and such a structure is thoroughly practicable, in view of the location of respondent's other plants and mains; but, owing to the cost of such a standpipe, and of the double pumpage thereby entailed, respondent would derive no profit from supplying water to the city or to private consumers in this elevated territory.

Respondent voluntarily assumed the duty of an important and essential public service, which was, indeed, its very *raison d'être*, in return for which it was clothed with sovereign powers and invested with potentially profitable franchises by both state and city. Upon the faithful discharge of this duty depends, as the preamble to its charter declares, "the health and comfort of the citizens of Birmingham," and it cannot justly be permitted to render that service when and where it is found to be profitable, and to omit it when and where it deems the service inconvenient or unremunerative. It would be a narrow and unreasonable construction of the provision for general and continued service to the city and its inhabitants to hold that the equipment required to be originally provided should measure for all time the extent of that service. The object of sections 5 and 7 was evidently to make certain an initial service that would be adequate and satisfactory, as a condition precedent to the operation of the contract and the enjoyment by respondent of its privileges and perquisites. In other words, these requirements were but details of more or less temporary expediency, and not qualifications of respondent's general duty to serve as the exigencies of the future might require.

[1] Only parts of the opinion are printed. — ED.

STATE ex rel. HOWIE, DISTRICT ATTORNEY *v.* BENSON.

Supreme Court of Mississippi, 1914.

[108 *Miss.* 779.[1]]

Cook, J., delivered the opinion of the court.

Will the courts under these circumstances refuse to intervene, and compel the successor of the corporation to perform the duties of the corporation? This, we believe, was the precise question presented to the Circuit Court. Mr. Benson bought the franchise of the corporation to do business in Jackson. The corporation took possession of and enjoyed this franchise for several years. The corporation undertook to and did perform the duties of a public service corporation in exchange for the license or franchise to use the property of the city for this purpose. He cannot hold on to the benefits of his purchase without incurring the obligation to perform the duties of the trust. This seems to be made certain when it appears that he refuses to assume the burdens, if burdens there be, because he has entered into a compact with others to do so for the purpose of creating a monopoly — of destroying competition.

There seems to be no conflict in the authorities that courts possess in proper cases the power to compel trustees of a public trust to perform the duties of such trust. Leaving out of view section 910, Code of 1906, it seems clear that Mr. Benson assumed the burdens of an involuntary trustee when he took over the franchise of the corporation, and is declining to use the same for the purpose of creating a monopoly. The apparent conflict in the decisions of the courts upon the power of the courts to compel the performance of legal duties of trustees grows out of the peculiar state of facts in the several cases. In some cases the courts have refused to issue the writ of mandamus because it appeared that the corporation, or trustee, was unable to perform. In other cases the writ was denied because, in the opinion of the courts, to compel the performance of the alleged duty would work a great hardship without a compensating benefit. There is and can be no conflict of judgment that, in proper cases, the courts will and do exercise the power to compel the performance of legal duties. The petition in this case declares a state of facts which justifies the exercise of this extraordinary power.

Reversed and remanded.

[1] Only the concluding portion of the opinion is printed. — Ed.

ANONYMOUS.

KING'S BENCH, 1623.

[*Godbolt*, 335, pl. 440.]

FOUR several men were joyntly indicted for erecting and keeping of four several inns in Bathe; It was moved that the indictment was insufficient, because the offence of the one is not the offence of the other, like unto the case in Dyer 19. Where two joyn in an Action upon the Case for words, 't is not good, but they ought for to sever in their actions, because the wrong to the one, is no wrong to the other. DODERIDGE, Justice. One Indictment may comprehend several offences, if they be particularly laid, and then it is in law several indictments: it may be intended that the inns were lawful inns; for it is not laid to be *ad nocumentum*, and therefore not punishable; but if they be an annoyance and inconvenient for the inhabitants, then the fame ought particularly to appear; otherwise it is a thing lawful to erect an inn. An action upon the case lyeth against an innkeeper who denies lodging to a travailer for his money, if he hath spare lodging; because he hath subjected himself to keep a common inn. And in an action upon the case against an innkeeper he needeth not to shew that he hath a license to keep the inn. If an innkeeper taketh down his signe, and yet keepeth an hosterie, and action upon the case will lie against him, if he do deny lodging unto a travailer for his money; but if he taketh down his signe, and giveth over the keeping of an inn, then he is discharged from giving lodging. The indictment in the principal case is not good, for want of the words (*ad Nocumentum*) HAUGHTON and LEY, Justices agreed. LEY, If an indictement be for an offence which the court *ex officio*, ought to take notice to be *ad Nocumentum*, there the indictement being general, *ad nocumentum & contra Coronam & dignitatem*, is sufficient, without shewing in what it is *ad Nocumentum*. But for the inns, it is lawfull for to erect them, if it be not *ad Nocumentum*, and therefore in such indictements, it ought to be expressed that the erecting of them is *ad Nomenentum*, *&c.* and because in this case there wants the words *ad Conumentum*, the Indictement was quashed. Vi. The Lord NORTH and PRAT'S Case before to this purpose.

NEWS PUBLISHING COMPANY *v.* SOUTHERN RAILWAY COMPANY ET AL.

SUPREME COURT OF TENNESSEE, 1903.

[110 *Tenn.* 684.[1]]

DEFENDANT railway company contracted with defendant Commercial Publishing Company, agreeing to run a special early morning train, carrying only the newspapers of said publisher, in consideration of said publishing company guaranteeing to it certain revenue from the operation of the train. This train became one of its schedule trains and was advertised as such, and was controlled exclusively by the railway company, which received all the revenues derived from the operation of said train, both in the carrying of passengers and freight.

Complainant, publishing the Memphis Morning News, demanded of defendant railway company the right to ship as freight its packages of newspapers to its several agents at various stations along the line of railway where the train was scheduled to stop, and tendered the usual charges on the same; but said defendant refused to transport said newspapers, alleging as grounds of its refusal, the obligations of its contract with defendant Commercial Publishing Company.

MR. CHIEF JUSTICE BEARD. One of the duties imposed upon a railroad as a common carrier is that it shall deal fairly and impartially with all who seek, as passengers or shippers of freight, to avail themselves of its service. Impressed, as it is, by its grant of franchises, with a trust to the public, this trust can only be discharged by extending equal facilities to each member constituting the public. It fails of its duty, therefore, when discriminating between individuals in like condition, it gives one an advantage in the carriage of his person or property which it refuses to another, and it follows that any contract made by it, by which one or more members of a class are fostered at the expense of or to the detriment of others of the same class, who demand like service, is unenforceable.

Granting that goods not dangerous in their nature and not unfit for shipment are offered at a proper place and time, and that the cost of carriage is tendered, and the railroad has facilities for shipment, then it must accept and transport them. In doing this it "can show no favor, nor make distinctions which will give one employer an advantage over another, either in the time or order of shipment, or in the distance of the carriage, or in the conveniences or accommodations which may be afforded." Hutchinson on Carr., sec. 297; New Eng. Ex. Co. *v.*

[1] The statement is taken from the head note. Only an extract from the opinion is printed. — ED.

Maine Cent. R. R., 57 Me. 188, 2 Am. Rep. 31; Messenger *v.* Penn. R. R., 36 N. J. Law, 407, 13 Am. Rep. 457; Union Pac. Ry. Co. *v.* Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986.

These general principles are conceded by the defendants to be sound, but it is insisted they do not control the present case. It is admitted — or it is true, whether admitted or not — that the railway company, as to the train in question, was a common carrier of passengers and their baggage, and of mail and express; but it is contended that it was, by reason of its contract with the Commercial Publishing Company, a private carrier of newspapers, and therefore was under no obligations to admit the newspapers of the complainant on its train.

It is true "a common carrier may become a private carrier or bailee for hire, when as a matter of accommodation or special agreement he undertakes to carry something which it is not his business to carry." Hutchinson on Carr., sec. 44. For example, "if a carrier of produce, running a truck boat, should be requested to carry a keg of silver or a load of furniture, . . . he might justly refuse to receive such freight, except by such an agreement as he might choose to make. . . . But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." N. Y. C. R. R. Co. *v.* Lockwood, 17 Wall. 357, 21 L. Ed. 627. *Affirmed.*

WESTERN UNION TELEGRAPH COMPANY *v.* FROTLER.

COURT OF APPEALS OF ILLINOIS, 1894.

[55 *Ill. App.* 659,[1]]

WALL, J. Appellee recovered a judgment against appellant for $134.09 for failing to deliver a telegram addressed to him by a commission firm in Chicago. Appellee was a farmer, residing a mile and a quarter from the village of Kansas. Having some marketable cattle which he wished to sell, he wrote to the commission firm for information and they sent him the telegram in question. They did not know whether he lived in the village or what arrangements he might have made for having a telegram delivered to him and paid merely for its transmission to Kansas. The operator did not know the appellee but made effort to find him within the village and failed to do so. He learned, however, where he lived, and it being beyond the free delivery limits, did nothing further. The appellant having heard in some indirect way that there was a telegram for him, called at the office and received it. In the meantime, not having heard from this commission firm, he had sent his cattle to another firm.

The claim is that if he had received the telegram promptly he would have sent the cattle in response thereto by the first train and would have realized a higher price than that received. The verdict represents the alleged difference. The telegram was received at Kansas at 1 : 10 P.M., July 5, 1892. It did not reach the hands of appellee until the 9th.

It appears that by a rule of the company the free delivery limit for a town of less than $5,000 inhabitants was one-half mile from office.

It is urged on the other side that this is a reasonable rule and that it should be enforced, and on the other that whether reasonable or not it does not appear that the sender or the appellee knew of it, and so it is not binding on either. The rule is reasonable, and not only so, but it is a matter of common knowledge among business men that there is always a limit for the free delivery of messages.

The trouble here was that the appellee did not expect a reply by wire. He went to the post office daily, but as he had not instructed the commission men to telegraph him it did not occur to him that they would, and they not knowing that he lived beyond the limit, made no arrangement with the company for delivery of the message. Hence it was bound to do no more than it was paid for, that is, transmit the message to the designated office and there make reasonable effort to deliver it within the free limit.

[1] Only one point is printed. — ED.

It is argued that the agent should have known from its terms, that it was a message of importance, but this did not require him to go beyond the limits of free delivery. If he inferred that the message was of unusual importance, he must also have inferred that the appellee was expecting it, and not living within the limits, would call for it. At any rate, such a conclusion on his part would have been reasonable.

We are of the opinion that the case shown by the proof did not justify the judgment, which will therefore be reversed and the cause remanded.

FARLEY *v.* LAVARY.

COURT OF APPEALS OF KENTUCKY, 1908.

[107 *Ky.* 523.]

JUDGE WHITE delivered the opinion of the court.

This action was brought by appellee for damages for the destruction of certain household goods. The allegations of the petition are that appellant, doing business as the Farley Transfer Company, contracted, for hire, to carry these household goods from Lexington to Nicholasville, and that while the goods were in the possession of appellant they were destroyed by reason of the negligence of the servants and employés of appellant in charge of the wagons. It is alleged that appellant is engaged in the business of, and is, a common carrier. The damage claimed is $500.

The answer denied that appellant was a common carrier at all; admitted a contract with appellee to haul by wagon her household goods from Lexington to Nicholasville, and admitted that while in transit certain of the goods were destroyed by fire, and other articles damaged, but denied that by reason thereof appellee was damaged to the extent of $500, or in any sum exceeding $250. The answer further pleaded that the destruction and damage to the goods by fire were without fault on his part, and denied that the fire was caused by the negligence of any of his servants.

The issue was tried before a jury, who returned a verdict for $400 for appellee. Judgment was entered accordingly, and from that judgment this appeal is prosecuted.

The facts proven on the trial without material controversy are that appellant, doing business as the Farley Transfer Company, had a number of vehicles running in the city of Lexington all duly and regularly licensed to haul for hire; that in such business he hauled for any and all persons, and goods and merchandise of all kinds; that he hauled in the city and about the city, to the fair grounds, and other

places. There was no dispute as to the contract with appellee to haul the household goods, nor of the fact of damage. As the cause of the fire, there was some proof that the driver was smoking; and, unless the fire caught from his pipe or cigar, it is unexplained how it originated. The proof as to the amount of the loss is conflicting.

The court gave to the jury an instruction as follows: "If the jury believe from the evidence that the fire which damaged or destroyed the goods of the plaintiff was caused by the negligence or carelessness of the defendant's agents or employés in charge of the wagon upon which said goods were being carried, or if the jury believe from the evidence that the defendant at the time of said fire was a common carrier, and was conveying said goods as a common carrier, the jury should find for the plaintiff."

The court then defined a "common carrier," and also gave the counterpart of No. 1 and as to the measure of damages. Appellant seriously objects to instruction No. 1, quoted, and to its counterpart. Counsel insists that there was not sufficient proof of negligence of the employé in charge of the wagon to sustain a recovery on that ground, and also that there was no evidence that appellant was, as to these goods, and this contract with appellee, a common carrier. Counsel therefore insists that instruction No. 1, *supra*, was error, for which a reversal must be had.

The instruction is based upon two ideas; *i. e.*, appellant is liable if the loss occurred by reason of negligence of his employé; appellant is liable if he was a common carrier. If from the evidence the court was authorized to submit to the jury the question of appellant being a common carrier, the question of negligence becomes unimportant. If appellant was a common carrier in carrying these goods, his liability stands admitted; for he nowhere pleads that the damage was caused by the act of God, the public enemy, or the inherent quality of the goods.

We are of opinion that by the evidence of appellant himself it is shown that he was a common carrier within the limits of the city of Lexington. He admits that he hauled for all or any persons, and had obtained a license so to do. Being a common carrier, appellant could have been compelled to haul for appellee within the territory in which he was engaged, but she could not have compelled him to go outside his territorial limit.

In this case, however, he contracted to go beyond his territory. Applying the facts to a railroad, we should say he agreed to go beyond the end of his line. It has repeatedly been held that, while a railroad cannot be compelled to accept and agree to carry goods to points beyond its line, yet it might do so. If the carrier contracted to convey beyond its line, it would be liable as a common carrier for the whole distance.

In the case of Ireland *v.* Mobile & Ohio Railroad Co., 105 Ky. 400 [20 Ky. L. R. 1586; 49 S. W. 188, 453], this doctrine is well settled. In the dissenting opinion by Mr. Justice BURNAM (Justice DURELLE

concurring) this principle is admitted and emphasized; the dissent contending that beyond its line a carrier may, by special contract, make its liability less than at common law.

It being clear by the proof that appellant was a common carrier, and agreed to carry these goods from some point in Lexington to Nicholasville, without any further contract, the liability of a common carrier attached the whole distance. The instruction given was, therefore, not error. There appears to us no error in the record.

The judgment is therefore affirmed, with damages.[1]

CROUCH *v.* ARNETT.

SUPREME COURT OF KANSAS, 1905.

[71 *Kans.* 49.[2]]

WILLIAM R. SMITH, J. This was an action in *mandamus*, brought by plaintiff in error in the district court to compel the firm of Arnett & Hobart, doing business as the Iola Telephone Company, to replace in his residence a telephone instrument which, it is alleged, was arbitrarily removed therefrom by the company.

Evidence was offered by the plaintiff showing that defendants, when this controversy arose, had been operating a local telephone system in Iola and vicinity for about seven years, and that the residence in which Crouch lived had been supplied with an instrument during that time. Three other persons, however, had lived in the premises during the time previous to the occupancy of plaintiff. There were 460 patrons of the telephone company in Iola and vicinity, 26 of whom were outside the city limits. The company also maintained telephones in connection with the Iola exchange at Gas City, three and one-half miles east, and at La Harpe, three miles further distant.

The residence of plaintiff was situated on grounds adjoining the city but not within the corporate limits. The pole from which the wire extended into Mr. Crouch's home was thirty feet from the house and situated within the corporate limits of Iola. A dispute arose between the company and Mr. Crouch respecting the payment of telephone charges, resulting in threats by the former to remove the instrument, but before it was taken out a payment was made, so that the question of the delinquency of the plaintiff is not a factor in the case.

Testimony introduced on behalf of the telephone company tended to show that telephones were installed in manufactories outside of the city — cement plants and brick-works — but that none of them was in the vicinity of Mr. Crouch's residence, the nearest being about half

[1] See also Bullard *v.* American Express Co., 107 Mich. 695. — ED.

[2] The dissenting opinion is omitted. — ED.

a mile. The zinc smelter adjoining the city to the northwest, the ice plant, a laundry, the water-works company and the pest-house west of the city limits were also supplied with telephones. Instruments were also furnished at the residences of four persons outside of the corporate limits of Iola, but these persons either furnished or paid for their own lines and poles.

Defendants in error were granted by ordinance the right to construct a telephone line in the city of Iola, and to use the streets and alleys for the erection of poles.

A trial before the court, without a jury, resulted in a judgment in favor of the telephone company, and plaintiff complains.

It may be conceded that defendants below, by devoting their property to public employment, and by putting it in the service of the public, thereby subjected it to the regulation of the legislature and control of courts to the same extent as other common carriers are controlled. (State of Missouri *v.* Bell Telephone Co., 23 Fed. 539; Delaware & A. Telegraph & Telep. Co. *v.* State of Delaware, 50 Fed. 677, 2 C. C. A. 1.) We also agree with counsel that such companies cannot lawfully discriminate between subscribers of the same class, and that a company or partnership doing a general telephone business in a city must treat impartially all persons whom they undertake to serve. Also, when doing a general business outside a city, all patrons in the vicinity must be dealt with impartially. The question of fact tried and considered by the court below was whether the telephone company was doing a general business outside of Iola and in the vicinity thereof. The general finding of the trial court determined the question in the negative, and that the limits of the company's general business outside the city did not embrace the plaintiff's residence. While the company was serving several manufactories beyond the city limits, they were not in the class with the plaintiff, and the owners of residences outside the city who had telephones were supplied at their own expense or paid for the poles and wires used to connect them with the exchange. If Mr. Crouch had resided in the city his rights would have been clear. Being outside, a question of fact was presented whether in removing his instrument a discrimination was practiced on him — a right infringed which he enjoyed in common with others situated similarly. A telephone company operating wholly within the corporate limits of a city could not be compelled to supply instruments to residents beyond the boundaries of the town and make connections therewith. In this instance it did serve patrons outside of Iola, but the disputed question was whether Mr. Crouch, by reason of proximity and other conditions, was entitled to equal rights with them. This was to be determined from the testimony of witnesses and was peculiarly within the province of the trial court. That there was some evidence to sustain the judgment of the court below cannot be denied.

The judgment is affirmed.

SAVANNAH AND OGEECHEE CANAL CO. *v.* SHUMAN.

SUPREME COURT OF GEORGIA, 1893.

[91 *Ga.* 400.]

LUMPKIN, J. 1. The 16th section of the charter of the Savannah, Ogeechee and Altamaha Canal Company, Dawson's Compilation, p. 97, declares, "that the said corporation shall be obliged to keep the said canals and locks in good and sufficient order, condition, and repair, and at all times free and open to the navigation of boats, rafts, and other water crafts; and for the transportation of goods, merchandise, and produce," etc. Counsel on both sides referred us to the above charter as that of the plaintiff in error, which is designated in the record as the "Savannah and Ogeechee Canal Co.," and is also thus designated in the case of Habersham *et al.* against this corporation in 26 Ga. 665. We therefore presume, without investigation, that the corporate name of this company was at some time properly amended by striking out "Altamaha" and placing "and" before "Ogeechee." It is apparent, without argument, that under this charter it is the imperative duty of this company to keep its canal in a navigable condition, and according to the principle of the ruling of this court in the case above cited, the performance of this duty may be enforced by *mandamus*.

2. It appears from the record that the defendant in error is engaged in the lumber business, and for several years had used the canal in question for transporting timber and other things, and that because of its unnavigable condition he was compelled to ship his timber by a more circuitous and expensive route. It is clear, therefore, that he is specially interested in the navigation for which this canal was chartered, and that by the failure of the company to keep the canal navigable he sustains a special damage in which the general public does not share. Under these circumstances he was, in our opinion, entitled to the writ of *mandamus* to compel a performance by the company of the duty above mentioned. There may be authorities to the contrary,

but the true law of this question seems to be in favor of the doctrine that a private person may, by *mandamus*, enforce the performance by a corporation of a public duty as to matters in which he has a special interest. See 2 Morawetz on Priv. Corp. § 1132; 4 Am. & Eng. Enc. of Law, 289, 291, and cases cited. In the case reported in 26th Ga., *supra*, the relief sought was granted at the instance of private persons, but it does not appear that the point was specially made as to their right, as such, to apply for the writ of *mandamus*, the position then taken by the canal company being that this writ would not lie at all.

3. In Moody *v.* Fleming, 4 Ga. 115, this court held that, except in a case of clear legal right, the writ of *mandamus* was a discretionary remedy. This view was followed in Harwell & Wife *v.* Armstrong *et al.*, 11 Ga. 328, and in Loyless *v.* Howell, 15 Ga. 554, injunction cases, in which this court, by citing the case first above mentioned, evidently intended to put cases of *mandamus* and of injunction upon the same footing as to the question of discretion. The granting, or refusing, of injunctions has always been regarded as discretionary, and it seems quite clear that in cases of *mandamus*, it lies very largely within the discretion of the presiding judge as to whether or not the writ will, in a given case, be made absolute; and in order to reverse a judgment in a case of this kind, it would be necessary to show that the discretion of the court was abused.

In the present case, the corporation answered that it had no funds, nor any means of obtaining such; and also, that it would not be profitable to operate the canal if it were put in navigable condition. For the purposes of the decision below this answer was taken as true, the question of its sufficiency being raised by demurrer.

So long as the corporation retains its franchise, it will not be allowed to urge as an excuse for failing to perform any duty required of it by its charter, that the same would be unprofitable. It cannot consistently keep the franchise and refuse to perform the duties incident thereto for the mere reason that such performance would be unremunerative. If the rights, privileges, and franchises granted by the charter are, in connection with the corresponding duties thereby imposed, no longer desirable, the company should simply surrender the charter.

As to the validity of the other reason alleged for failing to put the canal in a navigable condition, viz.: that the company is without funds, and without means of obtaining funds, the question is by no means so clear. The writer was inclined to hold that, under section 3200 of the code (providing that *mandamus* will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless), the answer of the company presented a good reason for refusing in this case to make the writ absolute. After some reflection, however, I have yielded to the better judgment of my brethren, and concluded to agree with them in holding that the entire matter may be safely left to the discretion of the circuit judge. While it is quite certain that if the company

has no funds now, nor any means of obtaining them, and remains permanently in this condition, compliance with the judge's final order will be impossible, so far as the corporation itself is concerned, there may be a change in the present condition of things, and the officers of the company may be able to find some way to raise money in order to obey the mandate of the court. At any rate, they should make a *bona fide* effort to do so. If, because of the want of means, they cannot comply with the writ, and if, after due diligence, they remain unable to procure the necessary means for this purpose, and make these things appear to the court in any proceeding for contempt which may be instituted against them, we apprehend the presiding judge would take great care to see that no injustice or hardship was imposed upon them, and certainly would not inflict punishment for a failure to do a thing impossible of accomplishment. This matter is not now directly before us, and we leave the question thus raised to be dealt with by the judge of the court below when it arises, if it ever does. *Judgment affirmed.*[1]

STATE EX REL. LITTLE *v.* DODGE CITY, MONTEZUMA AND TRINIDAD RAILWAY CO.

SUPREME COURT OF KANSAS, 1894.

[53 *Kan.* 329.]

HORTON, C. J. This proceeding has been commenced in this court, not for the purpose of compelling the Dodge City, Montezuma and Trinidad Railway Company or any of the defendants to operate the line of that railway in Ford and Gray Counties, or any part thereof, but merely to require the defendants to repair and relay certain portions of the track and roadbed of the railway company. A railway company may be compelled by *mandamus* to perform the public duties specifically and plainly imposed upon the corporation; and, therefore, we have no doubt of the power of this court, in a proper case, to compel a company to operate its road, and for that purpose to compel the replacement of its track torn up in violation of its charter. The State *v.* Railway Co., 33 Kans. 176; City of Potwin Place *v.* Topeka Ry. Co., 51 Kan. 609; U. P. Ry. Co. *v.* Hall, 91 U. S. 343; Rex *v.* S. & W. Ry. Co., 2 Barn. & Ald. 646. But the granting of a writ of *mandamus* rests somewhat in the discretion of the court. City of Potwin Place *v.* Topeka Ry. Co., *supra.*

The Montezuma railway company is insolvent. It has no cars or

[1] *Compare: In re* R. R., 17 N. B. 667; R. *v.* S. W. R. R., 2 B. & A. 646; Pacific R. R. *v.* Hall, 91 U. S. 343. — ED.

engines. Its line of road has not been operated for many months. The road cannot be operated except at a great loss. The railway company is not able to operate it, and has no funds or property which can be applied to the payment of operating expenses. A. T. Soule, the promoter of the railway company, has expended over $200,000 in the construction and operation of the road without any returns. All of its property was sold, or attempted to be sold, to the Block-Pollak company for $25,000 only. The venture of the promoter has been very unsuccessful to him. His experience, and the other parties investing, in constructing and operating this railway has been most unfortunate. No one connected with the railway corporation has realized any personal benefit from any bond, mortgage, or subsidy of the road. The Rock Island road, which, by an arrangement with the Montezuma company, ran its trains over the road from the time of its completion until May, 1893, and which has better facilities for operating the road than any other company or person, will not take the road as a gift and operate it. It seems to be conclusively shown that all the receipts to be derived from operating the road will not pay the operating expenses, not taking into account the repairs of the road and the taxes.

The contention on the part of the plaintiff is, that as the railway was sold to E. F. Kellogg for Wilson Soule by a receiver, and not by the sheriff of Ford County, the sale is absolutely void. If this be true, then there is no legal duty upon the part of Wilson Soule to repair or operate the road. If, however, the sale is not absolutely void, we do not think, upon the showing made, that Wilson Soule, as a private person, ought to be compelled to operate the road. The Block-Pollak Iron Company cannot, under its conditional purchase of the superstructure, be compelled to repair or operate the road. There is no legal duty upon any of the other defendants to repair the road. Therefore, the question is, whether the court will compel, or attempt to compel, the railway company, a bankrupt corporation, to relay the track and repair the roadbed. The court will not make a useless or futile order. It will not do a vain thing. The order prayed for should only be issued in the interest of the public. If the track is replaced, there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has little interest in the operation of the road or in its being kept in repair. Mor. Priv. Cor. 1119; Commonwealth *v.* Fitchburg Ry. Co., 12 Gray, 180; O. & M. Ry. Co. *v.* People, 30 Am. & Eng. Ry. Cases [Ill.], 509; People *v.* A. & Vt. Ry. Co., 24 N. Y. 261.

The average life of cedar ties — the kind used on this road — is from three to five years. All the ties laid in 1888 will soon be so much decayed as to be worthless. A large part were worthless when the track was taken up. If the track were relaid, the road would be in no reasonable condition to be used, unless new ties were furnished, and these in a few years would again become decayed and useless. The use of the road was abandoned before any part of the track was torn

up. If the track were replaced, it would be of no immediate public benefit — possibly of no future benefit — because, if the railway is not operated, the mere existence of a road, not in use, is not beneficial to any one.

The peremptory writ prayed for will be denied, with costs.

All the justices concurring.

WELD *v.* GAS & ELECTRIC LIGHT COMMISSIONERS.

SUPREME COURT OF MASSACHUSETTS, 1908.

[197 *Mass.* 556.]

PETITIONS by Charles G. Weld for *certiorari* against the board of gas and electric light commissioners, to review a decision of the board, and for *mandamus* against the Edison Electric Illuminating Company of Boston. Cases reported to the full court. Petitions dismissed.

It appeared that the petitioner, the owner of a house on Bay State Road in Boston had formerly been supplied with electricity by the respondent, Edison Illuminating Company of Boston, but in the year 1902 an arrangement was made between the respondent and a Brookline company by which the conduits and business of the Boston Company on the westerly side of a line fixed were taken over by the Brookline company, and thereafter the petitioner was furnished current by the Brookline company as his house lay to the west of the line.

KNOWLTON, C. J. The petitioner is seeking the enforcement of an alleged public right. His private interest is not independent of the rights of the public, but he claims only through the public, and as one of the citizens who are to be served by the respondent. See Brewster *v.* Sherman (Mass.), 80 N. E. 821. The facts show that he has suffered nothing in the sufficiency or quality of the service, or the price charged for it. So far as appears he is not likely to suffer in the future. Indeed, the statutes above referred to are intended to give him perfect protection.

We come, therefore, to the question whether, under our laws, an electric light or gas company, having a franchise covering a city or town in which another company has a like franchise, cannot, in conducting its business, if the public interest is not thereby affected, arrange with the other company to extend its lines into one part of the territory that is being newly developed, and leave the other company to extend its lines into another part of the territory, so that neither company will duplicate lines in streets where the other is serving the public. It seems to us that, under such conditions, this is a detail of administration which is not in violation of law. In other words, we

think that a corporation making such an arrangement is not subject to prosecution under a writ of mandamus, for a failure properly to exercise its corporate franchise. We are not called upon to determine in this case whether such an arrangement could be availed of as a justification, if, unexpectedly it should turn out that the public interest was injuriously affected. We do not suggest that a corporation can relieve itself of the performance of its duties to the public under its franchise; but only that details of administration, not inconsistent with the legislative policy of the commonwealth, may be left to the corporation, so long as adequate provision is made for the public. We go no further than to say that, under conditions like the present, the public has no grievance which the court will recognize.

We do not think it fatal to the defence that the arrangement before us includes, with the undeveloped territory into which electric lighting is expected to be extended, a street or streets in which both companies had run wires previously. The same principle applies in both cases. In neither are the consumers left at the mercy of a monopoly.

The principal reasons which moved the courts to their decisions in Portland Natural Gas Co. *v.* State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639, in Brunswick Gaslight Co. *v.* United Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385, and in some of the other cases above cited, are entirely wanting in the present case.

In Com. *v.* Fitchburg Railroad Co., 12 Gray, 180, and in People *v.* Rome, etc., Railroad Co., 103 N. Y. 95, 8 N. E. 369, a railroad corporation was allowed to discontinue a part of the public service that previously had been rendered under its franchise. It was justified on the ground that the public interest did not longer require the service. The principle which lies at the foundation of those decisions is equally applicable to the present case. See, also, Crane *v.* Northwestern Railroad Co., 74 Iowa, 330, 37 N. W. 397, 7 Am. St. Rep. 479; San Antonio Street Railway Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834; Bullard *v.* American Express Co., 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. Rep. 358.

In each case the entry must be:

Petition dismissed.

VAN DYKE *v.* GEARY ET AL. CORPORATION COMMISSION OF ARIZONA.

SUPREME COURT OF THE UNITED STATES, 1917.

[244 *U. S.* 39.[1]]

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Van Dyke system appears to be the only water supply of the inhabitants of the original town of Miami (not including the "additions"). The number of water takers is not shown. But it appears that the large consumers who used meters numbered, at the time of the commission's investigation, 675, yielding a revenue of $11,378.10; and that the number of small takers must have been much larger, since the revenue derived from the flat rates was $14,517.35. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." Munn *v.* Illinois, 94 U. S. 113, 126. The property here in question was devoted by its owners to supplying a large community with a prime necessity of life. That Mrs. Van Dyke pumps the water on her own land, stores it in tanks on her own land and thence conducts it through pipes all upon her own land (the strips reserved in the streets for conduits being owned by her), and delivers it to purchasers at the boundary line between her and their properties; and that lot purchasers bought with the understanding that they might purchase water from Mrs. Van Dyke's water system at rates fixed by her — are all facts of no significance; for the character and extent of the use make it public; and since the service is a public one the rates are subject to regulation.

Counsel contend that the use is not public, because water is furnished only to particular individuals in fulfillment of private contracts made with the purchasers of townsite lots. But there is nothing in the record to indicate that such is the fact. Purchasers seem to have bought merely with the oral understanding that water could be secured from the Van Dyke system. Affidavits filed by appellants state expressly that their water system is operated "for the purpose of supplying the residents and inhabitants of said Miami Townsite with water, and not for the purpose of supplying persons outside of said townsite, or the public generally with water." The offer thus is to supply all the "inhabitants" within the given area; and that of course includes subvendees, tenants and others with whom the Van Dykes had no contract relations. The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility.

[1] The first part of the opinion is omitted. — ED.

CHAPTER III.

OBLIGATIONS OF PUBLIC DUTY.

CROSS *v.* ANDREWS.

QUEEN'S BENCH, 1598.

[*Cro. Eliz.* 622.]

ACTION upon the case against an innkeeper of *Stratton-Audley* in the County of *Oxon*. And declares upon the common custom of the realm, that an innkeeper should keep the goods of his guests safely, &c. The defendant pleaded, that when the plaintiff lodged with him, he was sick, and of *non sane memory* by occasion of his sickness whereof he then languished. It was thereupon demurred; and adjudged without argument for the plaintiff. For the defendant, if he will keep an inn, ought at his peril to keep safely his guests' goods; and although he be sick, his servants then ought carefully to look to them. And to say he is of *non sane memory*, it lieth not in him to disable himself, no more than in debt upon an obligation. Wherefore it was adjudged for the plaintiff.

KING *v.* LUELLIN.

KING'S BENCH, 1703.

[12 *Mod.* 445.]

THE defendant was master of the Bell Inn, in Bristol. He was indicted for not receiving one taken ill with the smallpox; and it was quashed for not saying he was a traveller.

REX *v.* IVENS.

MONMOUTH ASSIZES, 1835.

[7 *C. & P.* 213.]

INDICTMENT against the defendant, as an innkeeper, for not receiving Mr. Samuel Probyn Williams as a guest at his inn, and also for refusing to take his horse. The first count of the indictment averred that the prosecutor had offered to pay a reasonable sum for his lodgings; and the first and second counts both stated that there was room in the inn. The third count omitted these allegations, and also omitted all mention of the horse. The fourth count was similar to the third, but in a more general form. *Plea — Not guilty.*

COLERIDGE, J. (in summing up). The facts in this case do not appear to be much in dispute; and though I do not recollect to have ever heard of such an indictment having been tried before, the law applicable to this case is this: — that an indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstance occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers, and supplying them with what they want. It is said in the present case, that Mr. Williams, the prosecutor, conducted himself improperly, and therefore ought not to have been admitted into the house of the defendant. If a person came to an inn drunk, or behaved in an indecent or improper manner, I am of opinion that the innkeeper is not bound to receive him. You will consider whether Mr. Williams did so behave here. It is next said that he came to the inn at a late hour of the night, when probably the family were gone to bed. Have we not all knocked at inn doors at late hours of the night, and after the family have retired to rest, not for the purpose of annoyance, but to get the people up? In this case it further appears, that the wife of defendant has a conversation with the prosecutor, in which she insists on knowing his name and abode. I think that an innkeeper has no right to insist on knowing those particulars; and certainly you and I would think an innkeeper very im-

pertinent, who asked either the one or the other of any of us. However, the prosecutor gives his name and residence; and supposing that he did add the words "and be damned to you," is that a sufficient reason for keeping a man out of an inn who has travelled till midnight? I think that the prosecutor was not guilty of such misconduct as would entitle the defendant to shut him out of his house. It has been strongly objected against the prosecutor by Mr. Godson, that he had been travelling on a Sunday. To make that argument of any avail, it must be contended that travelling on a Sunday is illegal. It is not so, although it is what ought to be avoided whenever it can be. Indeed there is one thing which shows that travelling on a Sunday is not illegal, which is, that in many places you pay additional toll at the turnpikes if you pass through them on a Sunday, by which the legislature plainly contemplates travelling on a Sunday as a thing not illegal. I do not encourage travelling on Sundays, but still it is not illegal. With respect to the non-tender of money by the prosecutor, it is now a custom so universal with innkeepers to trust that a person will pay before he leaves an inn, that it cannot be necessary for a guest to tender money before he goes into an inn; indeed, in the present case, no objection was made that Mr. Williams did not make a tender; and they did not even insinuate that they had any suspicion that he could not pay for whatever entertainment might be furnished to him. I think, therefore, that that cannot be set up as a defence. It however remains for me next to consider the case with respect to the hour of the night at which Mr. Williams applied for admission; and the opinion which I have formed is, that the lateness of the hour is no excuse to the defendant for refusing to receive the prosecutor into his inn. Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive. The only other question in this case is, whether the defendant's inn was full. There is no distinct evidence on the part of the prosecution that it was not. But I think the conduct of the parties shows that the inn was not full; because, if it had been, there could have been no use in the landlady asking the prosecutor his name, and saying, that if he would tell it, she would ring for one of the servants. *Verdict — Guilty.*

PARK, J., sentenced the defendant to pay a fine of 20*s*.[1]

[1] *Compare:* Hawthorne *v.* Hammond, 1 C. & K. 404; Queen *v.* Rymer, 2 Q. B. D. 136; Kisten *v.* Hildebrand, 9 B. Mon. 72; Atwater *v.* Sawyer, 76 Me. 539. — ED.

LAMOND *v.* THE GORDON HOTELS, LIMITED.

COURT OF APPEAL, 1897.

[1897. 1 *Q. B.* 541.[1]]

LORD ESHER, M. R. The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in and given rooms, and she stayed there for a period of ten months. It was then intimated to her that the direction wished her to leave, but this she refused to do. Then notice was given to her requiring her to leave, and as she still refused, advantage was taken of her being out of the hotel, and her things were brought down and put outside, and on her return she was refused admittance.

The foundation of her action is that she was not allowed to stay on at the hotel. It was tried before the county court judge of Brighton without a jury, and he has arrived at certain conclusions of fact. He has found that the plaintiff was taken into the hotel as a traveller according to the custom of England, and to find that he must have also found that the hotel carried on business according to the custom, so that the proprietors were bound to take in every one that came and asked for lodgings, if there was room for them. He finds that she stayed so long at the hotel that at last notice was given to her to leave; and his findings are equivalent to saying that, when notice was given, she was no longer a traveller, nor entitled to be treated as such under the custom. If this is a question of fact it is not subject to appeal.

The learned judge must have found that the proprietors of the hotel held it out to the public as an inn that would take in any traveller who came, provided there was room to do so. I think it is a question of fact what was the intention of those who carried on the business of the hotel, and the county court judge has stated what that intention was. Such a finding in this case does not affect the position of other hotels, and I think it is open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England — at any rate, such a matter would be a question of fact.

Then comes the question whether the plaintiff went to the hotel in the capacity of a traveller. That is also a question of fact which the county court judge has determined.

The plaintiff has brought this action relying on the custom of England, and not on the point raised now for the first time of a contract outside the custom. The question is whether it is the law that if a person goes to an inn in the character of a traveller that person retains the same character for any time however long. If so, the law would be contrary to the truth; and I will never submit, unless compelled by an Act of Parliament, to say that a thing shall be deemed to be that

[1] Opinions only are printed. — ED.

which it is not. Therefore, the question whether a person has ceased to be a traveller seems to me again to be a question of fact, and mere length of residence is not decisive of the matter, because there may be circumstances which show that the length of the stay does not prevent the guest being a traveller, as, for instance, where it arises from illness; but it is wrong to say that length of time is not one of the circumstances to be taken into account in determining whether the guest has retained his character of traveller. In my opinion there was in this case evidence of facts which justified the county court judge in saying that the plaintiff had ceased to be a traveller. If this is a question of fact, there is no appeal from the decision of the judge; but even if there were an appeal, I agree with the conclusion to which he came, that the evidence showed that the plaintiff was no longer a traveller. Her case, therefore, was not within the custom, and the relations between her and the innkeepers were not under the custom.

It is put as an objection that if the relation between them is changed the rights of the innkeeper against the plaintiff had ceased. I do not say whether this is so, but the argument is not sufficient to prevent the conclusion at which I have arrived, that the relation may be altered from the original one of traveller and innkeeper.

Then we were asked to imply a contract or agreement by both parties, by which the innkeeper contracted to lodge the plaintiff so long as she wished to stay, upon the same terms as those upon which she was taken in, so that she was under no obligation to stay an hour longer than she chose, but he was bound to keep her so long as she liked to remain. To my mind such a contract cannot have been the intention of the parties when the relationship commenced.

I think, therefore, there is no ground for disturbing the decision in this case, and the appeal must be dismissed.

LOPES, L. J. The law of England imposed exceptional liabilities on an innkeeper and gave him exceptional rights. But these exceptional liabilities and rights applied only as between the innkeeper and those persons who came to the inn in the character of travellers. This is shown clearly by the old form of writ against an innkeeper for refusing to supply food and lodging, and from the old form of declaration, which will be found in Bullen and Leake's Precedents of Pleading. The question before us is, in what character was the plaintiff living at the inn when she received notice to quit it? Was she there as a traveller, or had she ceased to be a traveller and remained in some other capacity? I cannot help thinking that this is a question of fact on which the finding of the judge was conclusive; but I do not desire to rest my judgment on that ground, which may be regarded rather as technical. In my opinion there is no such rule as is suggested, that a person who comes to an inn as a traveller and remains there must remain as a traveller. In my opinion the learned judge was right when he found that the plaintiff when she was required to leave had ceased to be a traveller, and that, therefore, the innkeeper was fully justified,

after giving reasonable notice, in acting as he did. His judgment and that of the Divisional Court supporting it should be affirmed.

CHITTY, L. J. The plaintiff's claim is founded on the liability imposed by the general custom of England on the keeper of a common inn. There is no question of contract raised between the parties. The county court judge found, either as a question of fact or a mixed question of law and fact, that the defendants' hotel was an inn, and from that finding there is no appeal. Starting from that point, he considered whether the plaintiff, after being in the hotel for a period of ten months and considering all the circumstances of the case, still retained the character of a traveller which he attributed to her when she first went to the inn; and he decided, and this also may be a question of mixed fact and law, that she did not retain it. If this is a question of fact there is nothing more to be said on the appeal. The plaintiff's counsel, however, tried to treat it as a question of law; and turn his proposition about as you will, it still comes to this, that if a person once enters an inn as a traveller he can remain there in that character as long as he pleases. With reference to this proposition, though there are many authorities on the question of the common-law liability of an innkeeper, no suggestion to this effect can be found, and in my opinion it is not the law. It may be a difficult question to determine in any case when the character of traveller ceases and that of lodger or boarder begins; but in this present case I think the judge was entitled on the evidence to come to the conclusion at which he arrived, that the plaintiff had ceased to be a traveller. The custom of England does not extend to persons who are in an inn as lodgers or boarders, and the length of time that a guest has stayed is a material ingredient in determining such a question as was before the judge. If the character of traveller is continuous, it would follow that the plaintiff would have a right to reside at the hotel all her life, provided she conformed to the regulations and paid her bills, but that she could leave at any moment, while the landlord would be bound to provide lodging without any power to give notice to her to leave. This is a startling proposition, and, as it is moreover unsupported by authority, I cannot assent to it. It is hardly necessary to say anything about the suggested implied contract. The action was not founded on it, and the proposition itself will not bear examination. For these reasons I concur in the judgments already delivered.

Appeal dismissed.[1]

[1] *Compare:* Moore *v.* Beech Co., 87 Cal. 483; Davis *v.* Gay, 141 Mass. 531; Horner *v.* Harvey, 3 N. M. 197; Howth *v.* Franklin, 20 Tex. 798; Clary *v.* Willey, 49 Vt. 55. — ED.

FLEMING *v.* MONTGOMERY LIGHT CO.

SUPREME COURT OF ALABAMA, 1892.

[100 *Ala.* 657.]

COLEMAN, J. Appellant as complainant filed the present bill for the purpose of enjoining the respondent, the Montgomery Light Company, from removing its gas meter from the premises of complainant, and to enjoin the respondent "from refusing to furnish your orator gas." Complainant's rights are very clearly set forth in the bill and grow out of an agreement entered into in the year 1852 between the City of Montgomery and the John Jeffrey Company, by the terms of which the exclusive right and privilege of manufacturing and supplying gas for a period of fifty years for the city of Montgomery and its inhabitants was granted to the John Jeffrey Company, the said company agreeing on its part, "at all times to supply the inhabitants of the City of Montgomery, for private use, with a sufficient quantity of gas of the most approved quality." The Montgomery Light Company has succeeded to all the privileges and assumed all the obligations of the John Jeffrey Company. Stripped of the statement of facts necessary to present the complainant's case in an intelligible form, the one question raised is, whether the assumption to supply the inhabitants of the city of Montgomery with gas, imposes the legal duty on the company to furnish gas meters and keep on hand a sufficient quantity of gas, for inhabitants who do not use or consume gas, but who desire to be supplied "with meters and connections with the defendant's gas pipes so that in case an accident, which is apt to occur, should happen, they could use the gas."

A statement of the proposition suggests its answer. There can be no difference in principle between the case stated and the one in the bill, in which it is shown that at one time complainant used gas for lights, but at the time of filing the bill, and previous thereto, complainant used in his building electric lights furnished by a different company, or corporation, and was not a patron of defendant company, and the injunction was to make provision "to use gas" "in case an accident should happen to the electric lights in use by orator."

Plaintiff's contention is, that although he has made other arrangements with a different company for light, yet it is the duty of respondent to keep on hand gas and electricity with proper meters and connections and electric burners "in case of an accident" to the company which has contracted to supply him, and that too without any corresponding obligation on his part to use the gas of the defendant. We can find no such provision in the contract between the city and respondent, expressed or implied. There is no equality or equity in such a proposition. It is hardly necessary to cite authorities, but we refer to the following: Williams *v.* Mutual Gas Co., 50 Amer. Rep. 266; 52 Mich. 499.

There is no error in the record. *Affirmed.*

PUBLIC SERVICE CORPORATION ET AL. *v.* AMERICAN LIGHTING COMPANY.

COURT OF CHANCERY OF NEW JERSEY, 1904.

[67 *N. J. Eq.* 122.[1]]

PITNEY, V. C. The complainant, the Public Service Corporation, is the lessee for a long term of years, and in the possession as such, of the property of the other complainants, the Hudson County Gas Company and the Jersey City Gas Light Company. The complainants own and control and have been in the undisputed possession, for many years, of a gas manufacturing and distributing plant in the city of Jersey City, which distributing plant covers the entire city, and the companies are enjoying the franchise of laying and maintaining their gas mains under the surface of the streets of that city. They have for many years supplied the householding inhabitants with gas for domestic use, and have also, for a like period of time, supplied the municipality with gas for street lighting purposes. . . . The defendant, the American Lighting Company, is a corporation of the State of Maryland, and has no franchise whatever in the State of New Jersey or in the city of Jersey City; nor does it pretend to have any. It is simply the proprietor of what it claims to be a peculiarly meritorious light producing lamp, or burner, which it claims will produce a much greater amount of light from the same amount of gas than the burner heretofore in use by the complainants and known as the "Welsbach burner." By its affidavits it states that it has recently introduced its burners into several cities, including Baltimore, with great success. . . . This being its sole business, and, it not being either a citizen or householder of Jersey City, it has, in my judgment, no standing whatever, in its own right, to demand and receive from the complainants a supply of gas for any purpose whatever. . . . I am entirely of the opinion that the defendant, the Lighting Company, has no standing whatever, in its own right, to demand from the complainants a supply of gas. For the simple reason, above stated, that it is neither a householder nor a resident of Jersey City, and the obligation which is imposed upon complainants by reason of their enjoyment of a public franchise of laying mains in the streets to furnish gas, extending only to residential citizens of the city and to the municipality. It is quite absurd to say that any person who might happen to be walking along the street, and yet be destitute of any local habitation within the corporate limits of Jersey City has the least right to demand a supply of gas from the complainants.

[1] This abstract of this case is taken from the opinion of BRADFORD, D. J., in American Co. *v.* Public Service Co., 132 Fed. 794. — ED.

STATE EX REL. MILSTEAD *v.* BUTTE CITY WATER COMPANY.

SUPREME COURT OF MONTANA, 1896.

[18 *Mont.* 199.[1]]

THE appellant is a water company, engaged in supplying the inhabitants of the city of Butte with water, under its franchise. The city gave the corporation the right to lay its mains in its streets and alleys. The company, on the other hand, is required to supply the inhabitants of the city of Butte with water for general use, at prices specified in the franchise granted. The relator is an inhabitant of Butte, occupying premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water upon the ground that, "by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners?" We say not.

The performance of the duty the company undertook when it accepted the franchise granted was to supply the inhabitants of the city with water. "A waterworks company is a *quasi* public corporation. It must supply water to all who apply therefor and offer to pay rents." (Cook on Stock, Stockh. & Corp. Law, § 932.) The account of which the grant was given was a public purpose. (Lumbard *v.* Stearns, 4 Cush. 61.) Therefore, "the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made." (Morawetz on Priv. Corp. § 1129.)

The view that supplying a city and its inhabitants with water for general purposes is a business of a public nature, and meets a general necessity, is sustained by the great weight of authority reviewed in a learned opinion of LORD, C. J., in Haugen *v.* Water Co. (Or.), 28 Pac. 244. It was there said: "The defendant, by incorporating under the statute, for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise belonging to the public, and not enjoyed of common right, for the accomplishment of public objects, and the promotion of public convenience and comfort. Its business was not of a private, but of public, nature, and designed, under the conditions of the grant as well for the benefit of the public as the company."

[1] The principal point is printed. — ED.

Certainly, the company may make reasonable rules and regulations. Doubtless it may require payments in advance for a reasonable length of time. It may, within reasonable limitations, cut off the supply of those who refuse to pay water rents due. It may make regulations authorizing an examination of meters in houses at reasonable times, or adopt other reasonable rules for the regulation of its affairs. But it has no power to abridge the obligations, assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house in need of water for general purposes.

Whether the owner has made a contract with the corporation to hold himself personally liable or not, or whether he has signed any paper agreeing to subject his property to a lien for water rents, we will not discuss in this case. The water company in no case, however, can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner; and, if it has adopted a by-law that is in conflict with its franchise, which may be termed its constitution, or is unreasonable or oppressive, the subordinate rule or by-law will be set aside. (Thompson on Corp. § 1010 *et seq.*)

This relator was entitled to water, and to a receipt for his payment, issued directly to him, and to have the amount of his payment credited to him alone, and the by-law pleaded by the company is, as to him, clearly unreasonable; and it is immaterial to his rights whether the owner had any agreement with the company or not, or whether, as tenant, he knew of the existence of any such agreement. The duty of the company, under its franchise, and undertaken to be fulfilled, must be performed. The order appealed from is affirmed.

Affirmed.

NICHOLSON *v.* NEW YORK CITY RAILWAY COMPANY.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1907.

[118 *N. Y. App. Div.* 858.]

MCLAUGHLIN, J. This action was brought in the Municipal Court of the city of New York to recover a penalty of fifty dollars for the defendant's refusal to furnish the plaintiff a transfer between different lines of its street surface railroads in the city of New York in alleged violation of section 104 of the Railroad Law (Laws of 1890, chap. 565, § 105, as renumbered amd. by Laws of 1892, chap. 676).

Upon the trial, at the close of plaintiff's case, the defendant moved that the complaint be dismissed upon the ground, among others, that the plaintiff, at the time the transfer was refused, was not a passenger in good faith seeking to be transferred to a connecting line of

defendant's road; that, on the contrary, the fact was uncontradicted that her sole purpose in asking for a transfer was to bring an action to recover the penalty in case of its refusal. The motion was denied and the defendant, after offering in evidence the record in another case tried immediately preceding this one, rested and renewed the motion to dismiss. The motion was denied and judgment rendered in favor of the plaintiff for the penalty, together with the costs, from which the defendant appealed to the Appellate Term. There the judgment was affirmed, and, by permission, the defendant appeals to this court.

I am of the opinion that the determination of the Appellate Term and the judgment of the Municipal Court should be reversed and a new trial ordered. The section of the statute above referred to and which is relied upon as a justification for the maintenance of this action, reads as follows: "Every such corporation entering into such contract, shall carry or permit any other party thereto to carry, between any two points on the railroads or portions thereof embraced in such contract, any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall, upon demand and without extra charge, give to each passenger paying one single fare, a transfer entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village." The purpose of this statute is set forth in it. It is to promote the public convenience, and that this may be accomplished it directs that the railroads embraced in any contract referred to therein shall be operated substantially as a single road with a single rate of fare. The "public convenience" has reference manifestly to passengers travelling in good faith. This is apparent from the statute itself, because it commands that the railroad shall carry for a single fare between any two points on its roads "any passenger desiring to make one continuous trip between such points." The plaintiff, therefore, in order to maintain the action, had to prove that she became a passenger in the first instance in good faith and for the purpose of going to some point on the line to which she wished to be transferred. She not only failed to prove this fact, but her counsel frankly conceded at the trial, as he did upon the oral argument of the appeal in this court, that her sole purpose in becoming a passenger was to bring an action for the penalty provided in the statute. Obviously, under such circumstances, the action cannot be maintained.

It will be noticed that only a passenger who has been "aggrieved" can maintain an action to recover the penalty. The plaintiff was not

"aggrieved." Indeed, she would have been disappointed had she received the transfer demanded, because in that event the purpose of her taking the car would have been frustrated. The object of the statute, as already indicated, is to promote the public convenience. It is not to put money in an individual's pocket, unless such individual comes fairly within the provisions of the statute, viz., a passenger in good faith who has been aggrieved by the railroad company's refusal to give a transfer to some point on a connecting line to which he desires to go. (Myers *v.* Brooklyn Heights R. R. Co., 10 App. Div. 335; Southern Pacific Co. *v.* Robinson, 132 Cal. 408; Jolley *v.* Chicago, M. & St. P. R. Co., 119 Iowa, 491.)

In Myers *v.* Brooklyn Heights R. R. Co. (*supra*) the precise question here presented was considered and a similar conclusion reached. The construction there placed upon the statute was binding upon the Appellate Term and might well have been followed, but it was not — presumably because the court was of the opinion that it was controlled by Fisher *v.* N. Y. C. & H. R. R. R. Co. (46. N. Y. 644), but in the Myers case the reason why the Fisher case did not apply to an action brought to recover a penalty under section 104 of the Railroad Law was pointed out. The statute upon which the Fisher case rested (Laws of 1587, chap. 185) is materially different. That act provides that "any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same." Not a word is said in that statute about a passenger, but it is *the party* paying the excess of fare who may maintain the action. Here, the present statute is not only limited to a passenger, but to one who *desires* to go to some point on the connecting line. The statute, therefore, as it seems to me, by express provision precludes one from suing for a penalty who has no intent to go to a point on the connecting line, but who takes the car merely for the purpose of putting himself in a position to bring an action.

The determination of the Appellate Term and the judgment of the Municipal Court must, therefore, be reversed and a new trial ordered, with costs to appellant to abide event.

PATTERSON, P. J., HOUGHTON, SCOTT and LAMBERT, JJ., concurred.

Determination and judgment reversed, new trial ordered, costs to appellant to abide event.

FERGUSON *v.* THE METROPOLITAN GAS LIGHT COMPANY.

NEW YORK COMMON PLEAS, 1868.

[37 *How. Pr.* 189.]

By the court, BRADY, J. The plaintiff occupied one floor of a dwelling or tenement house in this city. The owner had put in it the service pipes for gas, according to the regulations of the defendants. He applied for gas which was supplied through one meter, placed in the cellar of the house. He also applied for separate meters for each floor, which were not furnished by the defendants, and it would seem because he had not put into the house separate or independent service pipes for each floor to which the meter might be connected.

It does not appear that this application being refused, he took any steps to enforce his demand.

It is conceded that the pipes in the house were sufficient to serve it with gas, and that gas could be carried to all parts of it through them.

The plaintiff when he became an occupant also applied for gas, and the defendants answered by saying that they had already furnished it to the building, and refused to place a meter on the plaintiff's floor unless separate and independent service pipes were provided. The plaintiff's application was not in fact alone for gas, but for a separate meter as well. He wanted the meter, as he stated on the trial, and the question really involved in this controversy is, whether the defendants were bound to furnish it.

The plaintiff sues for a penalty under the sixth section of the act of 1859 (Laws, p. 698), which provides that all gas companies shall supply gas to the owner or occupant of any building or premises, which may be required for lighting it or them, upon a written application therefor to be signed by him. It also provides, that if for the space of ten days after such application, and the deposit of a reasonable sum, as in the act provided (if required), the company shall refuse or neglect to supply gas, they shall pay to the applicant the sum of ten dollars and five dollars for every day thereafter during which such neglect or refusal shall continue.

It will be observed that there is no qualification on the obligation

imposed by the statute. The gas must be furnished or a penalty is incurred, which continues from day to day, as long as the refusal or neglect to supply it is continued. It will also be observed that the section referred to does not either directly or indirectly require the company to furnish a meter, either to the owner or occupant, for the whole or any part of the premises, and the act is equally silent as to the mode by which the gas shall be conveyed through the houses.

The plaintiff seeks the enforcement of a penalty, and whether the statute be regarded as penal or remedial, and one either to be strictly or liberally construed, his claim is not within its purview. Assuming that he is the occupant of premises within the meaning of the statute, which may well be questioned, and that he had the right to apply for gas, the answer to his demand is, that gas was supplied through the pipes provided by his landlord, which he could use if he chose to do so, and the response disposes of his claim. The owner of the building had exhausted the power to compel the defendants to furnish gas, under section six of the act referred to. They had granted his application for it, although they had declined to furnish separate meters, a neglect or refusal of which to him he alone could take advantage of. The gas having been thus furnished, no penalty was incurred by them, unless the omission to supply a meter to the plaintiff is fairly within the application for gas and included in it.

This cannot be. The meter is employed for the benefit not of the consumer but the company, and cannot be used without tests which the former may insist shall be applied (§ 5). If the company prefer, they may supply the gas without it, for aught that appears in this case. The statute does not require them to furnish it, and that in itself may be sufficient to dispose of this case. If the statute be strictly construed, the defendants are not liable, because they have furnished gas to the building which includes the premises occupied by the plaintiff, and which only they were bound to furnish, and if it be liberally enforced, then the defendants should not be obliged to provide an article which is not required by the letter of the law, nor necessary to the plaintiff for the enjoyment of the light which he desires, nor should such a construction create a duty which under its provisions is not declared.

It must be said in addition, that if it were otherwise considered, that the defendants should not be prohibited from adopting reasonable rules with reference to the introduction of gas, protective of their own interests.

They proved on the trial, that it was not customary to put in separate meters such as demanded by the plaintiff, without separate service pipes, and that they were necessary to prevent "tapping," which would result in a fraud upon their rights. The legislature has by various provisions in the act of 1859 sought to guard them against fraud and theft, and has taken the lead in anticipating violations of fair dealing, against which corporations as well as natural persons are guaranteed

under our laws, the right to protect themselves, even in the discharge of duties imposed upon them.

For these reasons the judgment should be reversed.

LAWRENCE *v.* PULLMAN PALACE CAR CO.

SUPREME COURT OF MASSACHUSETTS, 1887.

[144 *Mass.* 1.[1]]

DEVENS, J. The gist of the plaintiff's claim is that he was wrongfully refused accommodation in the sleeping car of the defendant, in coming from Baltimore to New York, by the defendant's servants; and that, on declining to leave the car, he was ejected therefrom. His argument assumes that it was for the defendant to determine under what circumstances a passenger should be allowed to purchase a berth, and, incidentally, the other accommodations afforded by the sleeping car. An examination of the contract with the Pennsylvania Railroad Company, by virtue of which the cars owned by the defendant were conveyed over its railroad, shows that, while these cars were to be furnished by the defendant corporation, they were so furnished to be used by the railroad company "for the transportation of passengers;" that its employees were to be governed by the rules and regulations of the railroad company, such as it might adopt, from time to time, for the government of its own employees. While, therefore, the defendant company was to collect the fares for the accommodations furnished by its cars, keep them in proper order, and attend upon the passengers, it was for the railroad company to determine who should be entitled to enjoy the accommodations of these cars, and by what regulation this use of the cars should be governed. The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made.

The railroad company had classified its trains, fixing the terms upon which persons should become entitled to transportation in the sleeping cars, and the cars in which such transportation would be afforded. It was its regulation that, between Baltimore and New York, this accommodation should only be furnished to those holding a ticket over the whole route. It does not appear that this was an unreasonable rule,

[1] This case is abridged. — ED.

but, whether it was so or not, it was the regulation of the railroad company, and not of the defendant. The evidence was, "that the ordinary train conductors of the Pennsylvania Railroad Company have full and entire authority over the porters and conductors of the Pullman cars, in regard to the matter of determining who shall ride in the cars, and under what circumstances, and in regard to every other thing, except" the details of care, &c. The defendant's servant, the plaintiff having entered the sleeping car, informed him that his "split tickets," as they are termed, were not such as would entitle him to purchase a berth, and that he could sell only to those holding "through passage tickets, intact, to the point to which sleeping accommodations were desired." The plaintiff was in no way disturbed until the train conductor (who was not the defendant's servant) came into the car, informed the plaintiff that his tickets were not such as to entitle him to purchase the sleeping-car ticket, and several times urged the plaintiff to leave the sleeping car, which the plaintiff refused to do. Whether accommodation was rightly refused to the plaintiff or not in the sleeping car, the refusal was the act of the railroad company's servant, and not of the defendant's, whose duty it was to be guided by the train conductor.

The ejection of the plaintiff was also the act of the railroad company, and not of the defendant. It is the contention of the plaintiff, that, even if he might be ejected from the car, it was done in an improper manner. The plaintiff testified that he was waiting for a "show of force," after his repeated refusals to leave the car. This exhibition of force was made by the train conductor, who put his hand upon him, when the plaintiff rose and yielded thereto. The defendant's conductor took hold of the plaintiff's arm when he rose, and aided the plaintiff in crossing the platform of the cars, but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant company; he was assisting the train conductor in the duty he was performing as servant of the railroad company. To conduct him across from one car to another in the manner described by the plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of the defendant's servant was in every way calculated to assist the plaintiff in his transit from one car to another.

Nor is the fact important that the car into which the plaintiff was passed subsequently became cold, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that, when the plaintiff entered the car, it was not in fit condition to receive passengers; and, by the contract, the management of it and the duty of furnishing fuel were entirely with the railroad company, and not with the defendant.

Judgment on the verdict.[1]

[1] Lemon *v.* Palace Car Co., 52 Fed. 262; Nevin *v.* Palace Car Co., 106 Ill. 226; Williams *v.* Palace Car Co., 40 La. Ann. 417. — Ed.

WESTERN UNION TELEGRAPH CO. *v.* DOZIER.

SUPREME COURT OF MISSISSIPPI, 1889.

[67 *Miss.* 288.]

CAMPBELL, J., delivered the opinion of the court.

The verdict is contrary to the law and evidence, and should have been set aside. There is no warrant in the evidence, in any view of the law, for a recovery of any actual damage, for none is shown, it not appearing that Dr. Dozier sustained any by reason of the non-receipt of a message requesting his services. The truth appears to be that no message was sent to Dr. Dozier, but that, an ineffectual effort having been made to get Dr. Walker at Nicholson, and Dr. Watkins at Hattiesburg, the operator at Poplarville inquired of the operator at Hattiesburg if Dr. Dozier was in the town and was informed in reply that he had removed to Gulf-Port, and this being supposed to be true, no message was sent to Dr. Dozier. It is certain that no message to him was charged for or paid for, and therefore nothing was received by the company on this account. It appears that the operator, Mr. Atkins, was in full sympathy with those trying to procure a physician, and at his own instance, and free of cost to them, wired to Ellisville for the purpose of getting a physician known to him, who lived there, and this suggests the improbability that he should have failed to transmit any message delivered to him to be sent to Dr. Dozier.

The only messages actually written for transmission were to Dr. Walker at Nicholson, and to Dr. Watkins at Hattiesburg and they were transmitted. If it be true that Stewart and Flanagan or either *told* the operator to wire Dr. Dozier, the question is, whether that was the delivery of a message, within the meaning of the law, for the non-transmission and delivery of which liability would be incurred by the company. In the absence of satisfactory evidence of a known course of business by the telegraph company to receive verbal messages orally delivered to operators for transmission, we are not willing to sanction the proposition that failure to transmit such a message is a ground for recovery against the company, either by statute or common law. It is common knowledge that messages are required to be written, and upon the blanks of the company, and it would be hazardous to pursue any other course. The very expression as to a message delivered to be sent, carries with it the idea of a written or printed message, and it would seem, that for one to *talk to the operator* as to the message he desired to send could not, in view of the course of business of telegraph companies, impose any liability on such company.

Reversed and remanded.

FRAZIER & COOPER *v.* KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILWAY COMPANY.

SUPREME COURT OF IOWA, 1878.

[48 *Iowa*, 571.]

DAY, J. (after reciting the special findings of the jury). From these special findings it appears that the plaintiffs came to Watson on the same train on which they expected to ship their hogs. The hogs to be shipped were not in the yards or on the depot grounds of the defendant when the train arrived at Watson, but were in a private yard in no way controlled or used by defendant. They had not been given into the control of any authorized agent of defendant. Defendant had not been notified to what particular station the hogs were to be shipped. Cars were placed at the yards of defendant, the night previous, in a suitable condition to be loaded, and they could have been loaded without the aid of a locomotive. Under such circumstances the plaintiffs had no right to demand or expect that the defendant's train should delay at the station until the hogs should be driven into the defendant's stock yards, loaded, way-bills made out, contract of shipment signed, and the cars placed in the train. If such delay could be demanded at one station, it could be demanded at every station on defendant's road. Both humanity and interest require that stock trains shall go forward with all reasonable dispatch. The plaintiffs should have left some one at Watson in charge of their hogs, and had them loaded and ready for shipment when the train arrived. Each train must be moved with reference to all the other trains on the road. A delay of a few minutes at one station might occasion a corresponding delay of every train on the line of road, and even result in accidents, destructive of property and life. No person desiring to become a passenger upon a train could rightfully demand a delay of one minute to enable him to reach the train and get on board. Upon what principle, then, can these plaintiffs demand damages because the defendant's train did not wait until they could drive their hogs into defendant's yard, load four cars, count them, have way-bill made out, shipping contract signed, and the cars placed in the train? But plaintiffs say the yards of defendant were not in suitable condition, and hence they were not required to have their hogs in defendant's yards. The special findings show the yards of defendant were not in suitable condition for keeping plaintiffs' stock, not being supplied with water. The special findings further show that the yards of defendant were in a suitable condition from which to load hogs. There is nothing shown to excuse plaintiffs from driving their hogs to defendant's yards, and having them loaded in time for the train.

It is further said that the agents of defendant a few days previously told Cooper he need not load two cars he then had there until after the train arrived. This particular transaction would not estop defendant

from insisting upon a compliance with the usual custom as to future shipments of a greater number of car loads. It is further said that the train stopped at the next station, Phelps, and loaded several cars of hogs, some of which were brought in in wagons and weighed after the train arrived. The special findings show that there was no delay at Phelps because the hogs were not in the yard of the company, and that the cars at Phelps were loaded when the train arrived, so far as could be done without the use of a locomotive. The very fact that the train had to stop and use its locomotive to load at Phelps is a reason why it ought not to be delayed at Watson, where the loading could be done without the use of a locomotive. It is said, however, that one car was loaded, and that plaintiffs should have damages because it was not taken in the train. But the hogs in this car were not counted, and no way-bill was made out, nor does it appear that plaintiffs desired or were willing that this car should go forward alone.

Affirmed.

ROBINSON *v.* BALTIMORE & OHIO RAILROAD COMPANY.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, 1904.

[129 *Fed.* 754.]

MORRIS, District Judge. This is an appeal from a decree of the Circuit Court for the Northern District of West Virginia, dated April 24, 1903, perpetuating an injunction by which the appellants were inhibited from attempting to ship coal against the consent of the railroad company in the city of Fairmont, in Marion county, W. Va., at a point known as "Walker's Siding," or at any depot of the railroad company except the depot or point provided by the railroad company for the reception and shipment of coal. The bill was filed November 20, 1902, by the appellee, the Baltimore and Ohio Railroad Company, a Maryland corporation, complainant, against the appellants, citizens of West Virginia, defendants, alleging that the railroad company maintained at Fairmont, in Marion county, W. Va., a station at which it received, stored, and delivered goods and merchandise, except coal, and also had there certain side tracks, known as "Walker's Siding," where it placed cars to receive and deliver all kinds of goods and merchandise, except coal, and owned and maintained there a roadway about 60 feet wide, over which shippers and receivers of goods, except coal, were allowed to drive teams and wagons in order to deliver and receive goods to and from the cars on said siding, but that the railroad company had forbidden, and had given public notice that it forbade, any one to receive or ship coal from or by the cars at said Walker's Siding, and had designated another siding in said city of Fairmont, called the "Belt Line," as the place where it would receive and ship coal, and had so repeatedly

notified the appellants. The bill further alleges that the appellants were not owners or operators of coal mines, and not regular shippers of coal, but had recently engaged in the business of hauling coal in wagons to Walker's Siding in order to put it on the cars of the railroad company for shipment to various points, that the appellants had been repeatedly warned not to do so, but they had forcibly persisted in hauling large quantities of coal to Walker's Siding, and depositing the same in large quantities on said railroad, and in forcibly taking possession of, and putting the coal upon, the cars placed there for other goods and merchandise, and had forcibly obstructed and were continuing to obstruct shippers and receivers of other goods from using the siding, and said other shippers were threatening to bring suits for damage against the plaintiff railroad company; that the appellants had hauled and dumped large quantities of coal at its freight station, and had blockaded and stopped up one door of the station, and had blockaded the roadway by congregating and keeping standing there horses and wagons, which they refused to remove, and which prevented the railroad company from either receiving or delivering other goods from its said freight station and Walker's Siding, to the irreparable injury and damage of the railroad company; that the said appellants for some time prior had been loading and shipping their coal from the designated point on the Belt Line, and the railroad company had assigned a certain per cent. of its cars for the use of the said appellants for shipping their coal, and had notified the appellants that they were subject to their use. The prayer of the bill was for an injunction restraining the appellants from obstructing the station, siding, roadway, and approaches thereto in the manner and by the means charged in the bill of complaint.

The answers of the appellants denied that the freight station and siding were maintained by the railroad company for other goods and merchandise, except coal, and averred that the station, and especially the side tracks and switches called "Walker's Siding," had been used and were maintained by the railroad company for the purpose of receiving and shipping coal in car-load lots, and denied that the Belt Line was a proper place to be designated by the railroad for the shipment of coal by the defendants, because it was over a mile farther in distance from defendants' mines, and the increased cost of the haul made the shipment of coal by the defendant at that point unprofitable. The allegations in the bill of complaint that the appellants had defiantly refused to comply with notice from the railroad that coal would not be received for shipment at Walker's Siding were not really controverted by the answers; and the depositions fully established that the defendants had resisted the order with force, and that great disorder had occurred, and an intolerable confusion and disturbance of the regular business of the station had resulted from the intentional blocking and obstructing of traffic by the appellants in order to force a compliance with their claims. The appellants' principal justification was that they had before the no-

tice been in the habit, from time to time of shipping small quantities of coal at Walker's Siding. The reply to this by the railroad company was that on account of the scarcity of other coal in the winter of 1902, and the rise in price, the quantity shipped at Walker's Siding became so great that it interfered with other merchandise, and the railroad company was compelled, in the reasonable regulation of its business, to provide another place for shipping coal from Fairmont.

Quite recently a case in all points similar to the case in hand was heard on appeal in the Eighth Circuit (Harp *v.* Choctaw, O. & G. R. R. Co., 125 Fed. 445); and, in a careful opinion by Circuit Judge Thayer, it was held that a railroad company had the right to make reasonable regulations, applicable alike to all shippers, as to the manner in which such a commodity as coal would be received for transportation, and could not be held answerable because it refused to receive coal hauled by wagons to the side tracks of a station, and that the power to make reasonable regulations as to the manner and place where the railroad would receive coal for shipment implied the power to change and modify such regulations from time to time upon reasonable notice to the public. We do not think it necessary to attempt to add anything to the reasoning and citation of authorities by which the ruling in that case is supported. The case of the appellants depends entirely upon their alleged right to compel the railroad company to receive the appellants' coal at Walker's Siding because other merchandise was received there. This right cannot be sustained. It is not shown that the Belt Line designated by the railroad company as the place where, on account of the large temporary increase in the shipment of coal, it would receive it, was an unreasonable place in any way. It was a more distant place for the appellants, but it may have been nearer to others. It is not shown that, under all the circumstances, it was not a reasonable provision for the transportation of coal at Fairmont.

The case stated in the bill of complaint, and established by the depositions, was a most proper one for relief by injunction. The depositions showed that the persistent efforts of the appellants to block up the approaches to Walker's Siding with teams, which were kept there for the purpose of obstructing traffic, and the taking possession of cars intended for shippers of other merchandise, and the dumping of coal at the siding and station, had resulted during two days in suspending all freight business at the station, and threatened to continue indefinitely until the appellants had compelled submission to their demands. This amounted to a public nuisance, with immediate danger of irreparable mischief before the tardiness of the law could suppress it. In such cases the jurisdiction of courts of equity to give more adequate and complete relief by injunction has been fully

sustained. *In re* Debs, 158 U. S. 564, 587, 588, 596, 15 Sup. Ct. 900, 39 L. Ed. 1092.

We are of opinion that the decree for a permanent injunction was, in substance, right, and should be affirmed.

THE D. R. MARTIN.

CIRCUIT COURT OF THE UNITED STATES, SO. NEW YORK, 1873.

[11 *Blatch.* 233.]

HUNT, J. On the trial before the District Judge, the libellant, David F. Barney, recovered the sum of $1,000, as his damages for ejecting him from the steamboat D. R. Martin, on the morning of October 23, 1871. On an application subsequently made to him, the District Judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libellant was pursuing his business as an express agent on board of the boat, that he persisted in it against the remonstrance of the claimant, and that it was to prevent the transaction of that business by him on board of the boat, that he was ejected therefrom by the claimant. The steamboat company owning this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company, or a railroad company, is not bound to furnish travelling conveniences for those who wish to engage, on their vehicles, in the business

of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear both upon principle and authority. (Story on Bailments, § 591*a*; Jencks *v.* Coleman, 2 Sumner, 221; Burgess *v.* Clements, 4 Maule & Sel., 306; Fell *v.* Knight, 8 Mee. & W., 269; Commonwealth *v.* Power, 1 Am. Railway Cases, 389.) These cases show that the principle thus laid down is true as a general rule. The case of The N. J. Steam Nav. Co. *v.* Merchants' Bank (6 How. 344) shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although the carrier may have no custody or control of the goods, he is liable to the owner in case of loss, if he allows them to be brought on board. It is the simplest justice that he should be permitted to protect himself by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission, as freight, of any goods or property which the owners or agents should choose to place under the care and control of the carrier.

That persons other than the libellants carried a carpet bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other. But, if the service and the business had been precisely like that of the libellant the rule would have been the same. The rights of the carrier in respect to A. are not gone or impaired, for the reason that he waives his rights in respect to B., especially if A. be notified that the rights are insisted upon as to him. If Mr. Prime was permitted to carry a bag without charge on the claimant's boat, or to do a limited express business thereon, this gave the libellant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favor where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car, belongs to the carrier, and he can allow the privilege to one and exclude from it another, at his pleasure. A steamboat company or a railroad company, may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot

blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or boats are those of the carrier, and, I think, exclusively his, for this purpose. The sale or leasing of these rights to individuals, and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or of business.

It is insisted that the libellant could not legally be ejected from the boat for any offence, or violation of rules, committed on a former occasion. It is insisted, also, that, having purchased a ticket from the agent of the company, his right to a passage was perfect. Neither of these propositions is correct. In Commonwealth *v.* Power, (7 Met. 596,) the passenger had actually purchased his ticket, and the Chief Justice says: "If he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, and if Power believed that his intention was to violate a reasonable subsisting regulation, then he and his assistants were justified in forcibly removing him from the depot." In Pearson *v.* Duane, (4 Wallace, 605,) Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed. "But this refusal," he says, "should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board." The libellant, in this case, refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit, his removal from the boat. This was done with no unnecessary force, and was accompanied by no indignity. In my opinion, the removal was justified, and the decree must be reversed.[1]

[1] *Acc.* Barney *v.* Oyster Bay & H. S. B. Co., 67 N. Y. 301. — Ed.

McDUFFEE v. PORTLAND AND ROCHESTER RAILROAD.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1873.

[52 *N. H.* 430.]

CASE, by Daniel McDuffee against the Portland & Rochester Railroad, for not furnishing the plaintiff terms, facilities, and accommodations for his express business on the defendants' road, between Rochester, N. H., and Portland, Me., reasonably equal to those furnished by the defendants to the Eastern Express Company.

The defendants demurred to the declaration.[1]

DOE, J. I. A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. Sandford *v.* R. Co., 24 Pa. St. 378, 381; N. J. S. N. Co. *v.* Merchants' Bank, 6 How. 344, 382; Shelden *v.* Robinson, 7 N. H. 157, 163, 164; Gray *v.* Jackson, 51 N. H. 9, 10; Ansell *v.* Waterhouse, 2 Chitty, 1, 4; Hollister *v.* Nowlen, 19 Wend. 234, 239. He is under a legal obligation: others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. "There are certain cases in which, if individuals dedicate their personal services, or the temporary use of their property, to the public, the law will impose certain duties upon them, and regulate their proceedings to a certain extent. Thus, a common carrier is bound by law, if he have conveniences for the purpose, to carry for a reasonable compensation." Olcott *v.* Banfill, 4 N. H. 537, 546. "He [the common carrier] holds a sort of official relation to the public. He is bound to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow. He cannot refuse to carry a proper article, tendered to him at a suitable time and place, on the offer of the usual reasonable compensation. Story on Bailments, sec. 508; Riley *v.* Horne, 5 Bing. 217, 224; Bennett *v.* Dutton, 10 N. H. 486. When he undertakes the business of a common carrier, he assumes this relation to the public, and he is not at liberty to decline the duties and responsibilities of his place, as they are defined and fixed by law." Moses *v.* B. & M. R. R., 24 N. H. 71, 88, 89. On this ground it was held, in that case, that a common carrier could not, by a public notice, discharge himself from the legal responsibility pertaining to his office, or from performing his public duty in the way and on the terms prescribed by law.

"The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application." N. E. Express Co. *v.* M. C. R. R. Co., 57 Me. 188, 196. A common

[1] Arguments of counsel are omitted. — ED.

carrier of passengers cannot exercise an unreasonable discrimination in carrying one and refusing to carry another. Bennett *v.* Dutton, 10 N. H. 481. A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common-carrier transportation. With such a power, he would be a carrier, — a special, private carrier, — but not a common, public one. From the public service — which he entered of his own accord — be may retire, ceasing to be a common carrier, with or without the public consent, according to the law applicable to his case; but, as long as he remains in the service, he must perform the duties appertaining to it. The remedies for neglect or violation of duty in the civil service of the State are not the same as in the military service; but the public rights of having the duties of each performed are much the same, and, in the department now under consideration, ample remedies are not wanting. The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the State. A right of conveyance, unreasonably and injuriously preferred and exclusive, and made so by a special contract of the common carrier, is not the common, public right, but a violation of it. And when an individual is specially injured by such a violation of the common right which he is entitled to enjoy, he may have redress in an action at common law. The common carrier has no cause to complain of his legal responsibility. It was for him to consider as well the duty as the profit of being a public servant, before embarking in that business. The profit could not be considered without taking the duty into account, for the rightful profit is the balance of compensation left after paying the expenses of performing the duty. And he knew beforehand, or ought to have known, that if no profit should accrue, the performance of the duty would be none the less obligatory until he should be discharged from the public service. Taylor *v.* Railway, 48 N. H. 304, 317. The chances of profit and loss are his risks, being necessary incidents of his adventure, and for him to judge of before devoting his time, labor, care, skill, and capital to the service of the country. Profitable or unprofitable, his condition is that of one held to service, having by his own act, of his own free will, submitted himself to that condition, and not having liberated himself, nor been released, from it.

A common carrier cannot directly exercise unreasonable discrimination as to whom and what he will carry. On what legal ground can

he exercise such discrimination indirectly? He cannot, without good reason, while carrying A, unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities, and accommodations for the conveyance of A and his goods, provide such disagreeable ones for B that he is practically compelled to stay at home with his goods, deprived of his share of the common right of transportation? What legal principle, guaranteeing the common right against direct attack, sanctions its destruction by a circuitous invasion? As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities, or accommodations, which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And, as all common carriers combined cannot, directly or indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together nor one alone can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry, differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general by refusing to furnish any transportation whatever, or special by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operates as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character, — the right denied is one and the same common right, which would not be a right if it could be rightfully denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination,

and parcelled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.

The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practised by a carrier held to the common service is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment on the common right. But if for that service the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality or in some other particular. A service or price that would otherwise be reasonable may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious; in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons; in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law.

The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, or a reasonable price, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general prin-

ciple of reasonable equality which distinguishes the duty of a common carrier in the legal sense from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities, or accommodations may be reasonable, and required by the doctrine of reasonableness, and therefore not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations if they were there unreasonably and negligently exposed by the carrier to the society of small-pox patients. Sober, quiet, moral, and sensitive travellers may have cause to complain of their accommodations if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense, they would not. The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health, and comfort, are entitled to reasonable accommodations. 2 Greenl. Ev. sec. 222 *a;* Bennett *v.* Dutton, 10 N. H. 481, 486. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering, as plain as a broken limb; and if the injury is caused by unreasonableness of facilities or accommodations (which is synonymous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience, or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind, may be as clear a violation of the common right, and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is, not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff.

This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as

his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is one hundred dollars, and his just profit, not needed in his business, is one tenth of that sum, he has ten dollars which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty to whom transportation is one of the necessaries of life, and who suffer for lack of it. But if he charges the ten dollars to those who pay him for their transportation, if he charges them one hundred and ten dollars for one hundred dollars' worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, and reimburses himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed, — whether it was his, or one forced by him from others, including the party complaining of it. But it will not be necessary to consider this point further until there is some reason to believe that what the plaintiff complains of is defended as an act of disinterested benevolence performed by the railroad at its own expense.

In Garton *v.* B. & E. R. Co., 1 B. & S. 112, 154, 165, when it was not found that any unreasonable inequality had been made by the defendants to the detriment of the plaintiffs, it was held that a reasonable price paid by them was not made unreasonable by a less price paid by others, — a proposition sufficiently plain, and expressed by CROMPTON, J., in another form, when he said to the plaintiffs' counsel during the argument of that case: "The charging another person too little is not charging you too much." The proposition takes it for granted that it has been settled that the price paid by the party complaining was reasonable, — a conclusion that settles the whole controversy as to that price. But before that conclusion is reached, it may be necessary to determine whether the receipt of a less price from another person was a matter of charity, or an unreasonable discrimi-

nation and a violation of the common right. Charging A less than B for the same service, or service of the same value, is not of itself necessarily charging A too little, or charging B too much; but it may be evidence tending to show that B is charged too much, either by being charged more than the actual value of the service, or by being made the victim of an unjustifiable discrimination. The doctrine of reasonableness is not to be overturned by a conclusive presumption that every inequality of price is the work of alms-giving, dictated by a motive of humanity. If an apparent discrimination turns out, on examination, to have been, not a discrimination in the performance of the public duty, but a private charity, there is an end of the case. But if an apparent discrimination is found to have been a real one, the question is whether it was reasonable, and, if unreasonable, whether the party complaining was injured by it.

In some cases, this may be an inquiry of some difficulty in each of its branches. But such difficulty as there may be will arise from the breadth of the inquiry, the intricate nature of the matter to be investigated, the circumstantial character of the evidence to be weighed, and the application of the legal rule to the facts, and not from any want of clearness or certainty in the general principle of the common law applicable to the subject. The difficulty will not be in the common law, and cannot be justly overcome by altering that law. The inquiry may sometimes be a broad one, but it will never be broader than the justice of the case requires. A narrow view that would be partial cannot be taken; a narrow test of right and wrong that would be grossly inequitable cannot be adopted. If the doctrine of reasonableness is not the doctrine of justice, it is for him who is dissatisfied with it to show its injustice; if it is the doctrine of justice, it is for him to show the grounds of his discontent.

The decision in N. E. Express Co. *v.* M. C. R. Co., 57 Me. 188, satisfactorily disposed of the argument, vigorously and ably pressed by the defendants in that case, that a railroad, carrying one expressman and his freight on passenger trains, on certain reasonable conditions, but under an agreement not to perform a like service for others, does not thereby hold itself out as a common carrier of expressmen and their freight on passenger trains, on similar conditions. So far as the common right of mere transportation is concerned, and without reference to the peculiar liability of a common carrier of goods as an insurer, such an arrangement would, necessarily and without hesitation, be found, by the court or the jury, to be an evasion. A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by

a quibble. If there could possibly be a case in which the exclusive arrangement in favor of one expressman would not be an evasion of the common-law right, the question might arise whether, under our statute law (Gen. Stats. chs. 145, 146, 149, 150), public railroad corporations are not common carriers (at least to the extent of furnishing reasonable facilities and accommodations of transportation on reasonable terms) of such passengers and such freight as there is no good reason for their refusing to carry.

The public would seem to have reason to claim that the clause of Gen. Stats. ch. 146, sec. 1, — "Railroads being designed for the public accommodation, like other highways, are public," — is a very comprehensive provision; that public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference) so far as the property is used, or its use is rightfully demanded, by the public for whose use it was taken; and that, in a country professing to base its institutions on the natural equality of men in respect to legal rights and remedies, it cannot be presumed that the legislature intended, in the charter of a common carrier, to grant an implied power to create monopolies in the express business, or in any other business, by undue and unreasonable discriminations. There would seem to be great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the legislature the power of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms. And, if such power were attempted to be conferred, there would be, in this State, a question of the constitutional authority of the legislature to convey a prerogative so hostile to the character of our institutions and the spirit of the organic law. But, resting the decision of this case, as we do, on the simple, elementary, and unrepealed principle of the common law, equally applicable to individuals and corporations, we have no occasion, at present, to go into these other inquiries.

Case discharged.[1]

[1] *Compare:* Pickford *v.* G. J. Ry., 10 M. & W. 397; Parker *v.* G. W. Ry., 7 M. & G. 253; Parker *v.* G. W. Ry., 11 C. B. 545; Sandford *v.* R. R., 24 Pa. 378; New Eng. Exp. Co. *v.* R. R., 57 Me. 188. — Ed.

THE EXPRESS CASES.

Supreme Court of the United States, 1886.

[117 *U. S.* 1.]

Mr. Chief Justice Waite delivered the opinion of the court.[1]

These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. . . . The evidence shows that the express business was first organized in the United States about the year 1839. . . . It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company of some form of legal constitution. Every railway

[1] Part of the opinion is omitted. — Ed.

company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H., 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seem not to have been generally adopted. . . .

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently

the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influ-

ential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles, the American two hundred roads, with a mileage of 28,000 miles, and the Southern ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value, if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business, they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when

offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas, and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when

they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka and Santa Fé Railroad Co.* v. *Denver & New Orleans Railroad Co.*, 110 U. S. 667, followed at this term in *Pullman's Palace Car Co.* v. *Missouri Pacific Railway Co.*, 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

MR. JUSTICE MILLER dissenting.

When these cases were argued before Circuit Judge McCrary and myself at St. Louis, after due consideration and consultation with him and Judge Treat, of the District Court, I announced certain propositions as the foundations on which the decrees should be rendered. These were afterwards entered in the various circuits to which the cases properly belonged, and, I believe, in strict accordance with the principles thus announced.

I am still of opinion that those principles are sound, and I repeat them here as the reasons of my dissent from the judgment of the court now pronounced in these cases.

They met the approval of Judge McCrary when they were submitted to his consideration. They were filed in the court in the following language:

"1. I am of opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

"That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

"That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

"2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

"3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill, and diligence on the part of the railroad company.

"4. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

"5. I am of the opinion that it is the duty of every railroad com-

pany to provide such conveyance by special cars, or otherwise, attached to their freight and passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

"If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

"6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

"7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

"8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad company shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered to ascertain the reasonable compensation and compel its payment.

"9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

"10. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount paid. And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

"11. When no such arrangement has heretofore been in existence it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

"12. I am of opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the right of the express companies."

Three years' reflection and the renewed and able argument in this court have not changed my belief in the soundness of these principles.

That there may be slight errors in the details of the decrees of the Circuit Courts made to secure just compensation for the services of the railroad companies is possibly true, but I have not discovered them, and the attention of the court has not been given to them in deciding this case; for holding, as it does, that the complainants were entitled to no relief whatever, it became unnecessary to consider the details of the decrees.

I only desire to add one or two observations in regard to matters found in the opinion of this court.

1. The relief sought in these cases is not sought on the ground of usage in the sense that a long course of dealing with the public has established a custom in the nature of law. Usage is only relied on as showing that the business itself has forced its way into general recognition as one of such necessity to the public, and so distinct and marked in its character, that it is entitled to a consideration different from other modes of transportation.

2. It is said that the regulation of the duties of carrying by the railroads, and of the compensation they shall receive, is legislative in its character and not judicial.

As to the duties of the railroad company, if they are not, as common carriers, under legal obligation to carry express matter for any one engaged in that business in the manner appropriate and usual in such business, then there is no case for the relief sought in these bills. But if they are so bound to carry, then in the absence of any legislative rule fixing their compensation I maintain that that compensation is a judicial question.

It is, then, the ordinary and ever-recurring question on a *quantum meruit*. The railroad company renders the service which, by the law of its organization, it is bound to render. The express company refuses to pay for this the price which the railroad company demands, because it believes it to be exorbitant. That it is a judicial question to determine what shall be paid for the service rendered, in the absence of an express contract, seems to me beyond doubt.

That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it, when it becomes matter of controversy.

The opinion of the court, while showing its growth and importance, places the entire express business of the country wholly at the mercy of the railroad companies, and suggests no means by which they can be compelled to do it. According to the principles there announced, no railroad company is bound to receive or carry an express messenger or his packages. If they choose to reject him or his packages, they can throw all the business of the country back to the crude condition in which it was a half-century ago, before Harnden established his local express between the large Atlantic cities; for, let it be remem-

bered that plaintiffs have never refused to pay the railroad companies reasonable compensation for their services, but those companies refuse to carry for them at any price or under any circumstances.

I am very sure such a proposition as this will not long be acquiesced in by the great commercial interests of the country and by the public, whom both railroad companies and the express men are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief.

It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe *ought* to control the actions and the rights of these two great public services.

MR. JUSTICE FIELD dissenting.

I agree with MR. JUSTICE MILLER in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

MR. JUSTICE MATTHEWS took no part in the decision of these cases.[1]

OLD COLONY RAILROAD *v.* TRIPP.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1888.

[147 *Mass.* 35; 17 *N. E.* 89.]

W. ALLEN, J., delivered the opinion of the court.

Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers; it is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the sta-

[1] *Acc.* Pfister *v.* R. R., 70 Cal. 169; Louisville, &c. Ry. *v.* Keefer, 146 Ind. 21; 44 N. E. 796; Sargent *v.* R. R., 115 Mass. 416; Exp. Co. *v.* R. R., 111 N. C. 463; 16 S. E. 393. — ED.

tion, and holds it for that use; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. Stat. chap. 112, § 188; Fitchburg Railroad *v.* Gage, 12 Gray, 393; Spofford *v.* Boston & Maine Railroad, 128 Mass. 326. The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station, where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger, which will give him relations with the plaintiff involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job-wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all; and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers is Markham *v.* Brown, 8 N. H. 523, in which it was held that an innholder had no right to exclude from his inn a stagedriver who entered it to solicit guests to patronize his stage in opposition to a driver of a rival line who had been admitted

for a like purpose. It was said to rest upon the right of the passengers rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of a right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company. Barney *v.* Oyster Bay H. Steamboat Co. 67 N. Y. 301, and Jencks *v.* Coleman, 2 Sumn. 221, are cases directly in point. See also Com. *v.* Power, 7 Met. 596, and Harris *v.* Stevens, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff, which the plaintiff gave to Porter & Sons. The plaintiff made a contract with Porter & Sons to do all the service required by incoming passengers, in receiving from the plaintiff, and delivering in the town, baggage and merchandise brought by them; and prohibited the defendant and all other owners of job-wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. Section 188 of the Pub. Stats. chap. 112, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in § 191 for violations of the statute. The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depot, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers, and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station-grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depot for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job-wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English Railway & Canal Traffic Act, 17 & 18 Vict. chap. 31, requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." Marriott *v.* London & S. W. R. Co. 1 C. B. N. S. 499, was under this statute. The complaint was that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses, which brought passengers, were admitted. An injunction was ordered. Beadell *v.* Eastern Counties R. Co. 2 C. B. N. S. 509, was a complaint, under the statute, that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station, to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's was that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See also Painter *v.* London, B. & S. C. R. Co. 2 C. B. N. S. 702; Barker *v.* Midland R. Co. 18 C. B. 46. Besides Marriott's Case, *supra*, Palmer *v.* London, B. & S. C. R. Co. L. R. 6 C. P. 194, and Parkinson *v.* Great Western R. Co. L. R. 6 C. P. 554, are cases in which injunctions were granted under the statute: in the former case, for refusing to admit vans containing goods to the station-yard for delivery to the railway company for transportation by it; in the latter case, for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or dictum, in England or in this country, that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers; or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to use its station-grounds and buildings.

A majority of the court are of the opinion that there should be —

Judgment on the verdict.[1]

[1] *Acc.* Brown *v.* N. Y C. & H. R. R. R., 27 N. Y. Sup. 69. — Ed.

KATES *v.* ATLANTA BAGGAGE AND CAB CO.

SUPREME COURT OF GEORGIA, 1899.

[107 *Ga.* 636.[1]]

LITTLE, J. . . . The evidence was in direct conflict on many points. As to the truth of the allegations about which the evidence is conflicting, it is, so far as we are concerned, settled by the determination of the judge, and the right of the petitioner to have the judgment refusing the injunction reversed must depend on the application of legal principles to such of the allegations as are not contested by evidence, and these are: First, that the defendants permit the cab company to enter the passenger-trains before reaching the city, for the purpose of soliciting baggage, and refuse the same privilege to the petitioner. Second, that the servants of the cab company are allowed access to the passenger-station for the purpose of soliciting patronage and for more conveniently attending to its business, and this privilege is refused to petitioner. Third, that the privilege of using an office in the baggage-room of the defendants for the transaction of its business is granted to the cab company and refused to Kates. Fourth, the privilege of checking the baggage of prospective passengers at hotels and residences in advance of delivery of the baggage at the passenger-station; each of which privileges is refused to petitioner. It cannot successfully be maintained that the grant of these privileges to the cab company is in violation of law, nor do the concessions of themselves create a monopoly, nor are they in any sense an interference with the right of the travelling public. On the contrary, it will be recognized that the exercise of the facilities named tends to the public convenience and the prompt and safe handling of the baggage of the passenger. Under no view of the case would the petitioner be entitled to the aid of the courts in restricting these conveniences and lessening the facilities for the safe and convenient handling of the effects of a passenger. The law would hardly undertake to declare that a railroad company should not, if it so desired, through its representative deliver to one at his home in the city of Atlanta a check insuring the delivery of his trunk in the city of New York for which he was bound, and subject the passenger to the inconvenience of personally appearing at the baggage-room, pointing out his trunk, and there receiving the railroad company's check. We know of no obligation which requires that a railroad company shall furnish such a facility, but certainly there can be no reason to forbid its doing so, if it will; and likewise the privilege afforded to an incoming passenger before arrival to deliver to a responsible person the check for his baggage, with an obligation on the part of the latter to deliver the same at the residence or hotel of the passenger, infringes nobody's rights, but does promote the convenience of the travelling public; and rather than forbid, the law's administrators will encourage

[1] This case is abridged. — ED.

such a facility. It is not the right of the plaintiff in error, by injunction or otherwise, to take away or disturb any reasonable means tending to promote the convenience and comfort of the public. The merit of his complaint, if any exists, must be found in the fact of the refusal of the defendants to grant to him the opportunities so to serve the public and thereby better his business. Whether the refusal so to do is proper or unlawful does not depend upon the favor or inclination of the railroad company, but upon the plaintiff's right. If it should depend upon favor, then the plaintiff in error has no cause of complaint, because favor is essentially free and voluntary, and may not be demanded; and it is in this view that we come to measure by the legal standard what are the rights of the petitioner under the allegations he makes, as against the rights of the defendants to control property to which they have title and consequently the right of use, and the plaintiff in error, to succeed, must establish the proposition that the defendants as common carriers are in law bound to afford to him the same conveniences and facilities for carrying on his business which they afford to others engaged in the same calling.

It is claimed that the grant of the enumerated privileges to the cab company, and the refusal of them to petitioner, is the exercise of an undue preference on the part of the carrier against the business of petitioner, and that such grant and refusal establishes a monopoly which is forbidden by law. In entering into the consideration of these important questions, we find that the field of inquiry has been frequently traversed, with the result of adjudicated cases not entirely in harmony. In some of these, the decisions are based on the common law; in very many more, on the terms of various statutes; and it may be well to inquire whether our own organic or statute law deals particularly with such questions. It is undeniably true that the whole spirit of our constitution and laws is directed against any restriction of competition. Constitution of Ga., art. 4, section 2, par. 4. Section 2,214 of the Civil Code declares against discrimination in rates of freight and in the furnishing of facilities for interchange of freights, &c., as do also sections 2,188, 2,307, 2,268, and 2,274 of the Civil Code, in a greater or less degree. While it is perhaps true that there are no express rules of any of our statutes which enact penalties for unjust discrimination exercised by carriers to the detriment of the business of another, yet the scope and intent of the provisions to which we have referred are broad enough to afford a remedy. But in the absence of any statutory declaration, we are remitted to the principles of the common law to determine whether the refusal to grant the plaintiff in error the exercise of the facilities afforded to another in the same business is an unjust discrimination, or an unequal and illegal preference. The defendant railroad companies are common carriers and are under obligation to serve the public equally and justly. Having accepted their right of existence from the public, they owe a duty to the public, and their conduct must be equal and just to all. The

very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences. It implies indifference as to whom he may serve and an equal readiness to serve all who may apply in the order of their application. 57 Me. 188. From these characteristics, which apply to all common carriers, it is a sound legal principle that a railway company as a common carrier cannot grant to any person or persons, or to any part of the public, rights or privileges which it refuses to others, but must treat all alike. Receiving and discharging baggage is one of the duties of a public passenger-carrier, and the obligations before enumerated apply in full force in the receipt and discharge of baggage at the union passenger-station in the city of Atlanta; and if it should be found to be true that the defendant railroad companies, either in the receipt or delivery of baggage by their baggage-master or other agents, discriminated against any passenger or the agent of any passenger in the time or manner in which baggage was received or discharged either through a system of claim-checks or otherwise, such discrimination would be a palpable violation of their public duties, for which the law affords ample remedy by injunction and full redress in the nature of damages. So of injury to or undue interference with the baggage presented. Neither should discourteous language or personal ill-treatment by the agents of the carrier in the performance of his business be tolerated. As these charges were denied, and the judgment sought to be reversed necessarily included a finding against their truth, nothing more than a recognition of the principle need now be adverted to; but, inseparably connected with the transaction of its public business, a common carrier is invested with the ownership of property, for the safe and efficient exercise of the franchises which the public has for its own benefit given to it. Railroad companies have rights of way, stations, depots, cars, engines, &c., as their equipment to serve the public. In the use of such property as public carriers, no one of the public ought to be favored more than another, nor is it lawful to impose any restriction, or make any discrimination in such use, against any one, which does not apply to all; but this rule of impartiality applies to railroad companies in their public capacity, and it by no means follows that such reasonable rules and regulations which a carrier may make for the protection of its property, for the safety and convenience of its passengers or freights, are subject to the same unqualified condition.

This court in the case of Fluker *v.* Georgia R. R. Co., 81 Ga. 461, recognized the distinction which exists between the duty which a railroad company owes to the public and the private right to regulate and control its property. In that case the railroad company had leased to one individual the right of serving lunches to passengers on its trains at a given place. Another claimed the right to exercise the same privilege, which the company denied, and the claimant was expelled as an intruder. As in our opinion this case goes very far in determining the legal questions now presented, we freely refer to the opinion rendered by Chief Justice Bleckley as sound in principle, and authority

binding upon us. Through him the court says: "It is contended that the company has no such exclusive dominion over the tracks and spaces embraced in its right of way as to entitle it to exclude therefrom any person entering thereon in an orderly manner and upon lawful business; and especially that it cannot discriminate against one person and in favor of another. We have discovered no authority for this position, either in its more limited or more extended form. On the contrary, it would seem that the very nature of property involves a right to exclusive dominion over it in the owner. We cannot believe that there is a sort of right of common lodged in the public at large to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less complete or exclusive than that which every owner has over his property. If they do not choose to erect fences and make enclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers or with persons other than the companies themselves. . . . The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and consequently those who do engage in it and carry it on must depend upon the company for the privilege." Citing 67 N. Y. 301; 31 Ark. 50; 2 Gray, 577; 88 Penn. St. 424; 128 Mass. 5; 29 Ohio St. 364. This is the exposition of the law in force in this State, from which, as we believe, there has been no departure. If the principles declared are applicable to the facts of the present record, it would seem that the contention of the plaintiff that he should be allowed, as a matter of right, access to the depot-grounds and trains of the defendant railroad companies to ply his business, must fail. The case clearly rules the principle that a railroad company has the right to exclude from its premises persons going thereon for the purpose of transacting private business; and a second proposition is equally as clearly stated to be, that the privilege of doing so may be granted to one and refused to another without violating any principle of law which governs the conduct of carriers and regulates their duty to the public.

CITIZENS' BANK *v.* NANTUCKET STEAMBOAT CO.

CIRCUIT COURT OF THE UNITED STATES, 1811.

[2 *Story*, 16.][2]

STORY, J. This cause has come before the court under circumstances, involving some points of the first impression here, if not of entire novelty; and it has been elaborately argued by the counsel on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment.

The suit is in substance brought to recover from the Steamboat Company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the Island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which it was lost, do not appear distinctly in the evidence; and are no otherwise ascertained, than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him; but exactly how and at what time he does not know. The libel is not *in rem*, but *in personam*, against the Steamboat Company alone; and no question is made (and in my judgment there is no just ground for any such question), that the cause is a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction; and, therefore, it is properly to be entertained by this court upon the appeal.

There are some preliminary considerations suggested at the argument, which it may be well to dispose of, before we consider those, which constitute the main points of the controversy. In the first place, there is no manner of doubt, that steamboats, like other vessels, may be employed as common carriers, and when so employed their owners are liable for all losses and damages to goods and other property in-

[1] *Compare:* East India Co. *v.* Pullen, 2 Strange, 690; Brind *v.* Dale, 8 C. & P 207; Liver Alkali Co. *v.* Johnson, L. R. 9 Ex. 338. — ED.

[2] This case is abridged. — ED.

trusted to them as common carriers to the same extent and in the same manner, as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties, and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations, and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the drivers employed by them, to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. *A fortiori*, they would not be liable for the carriage of parcels of money, or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend, that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence, to a passenger, whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily em-

ployed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see, how the court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.

In the next place, I take it to be exceedingly clear, that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry, whether in point of fact the respondents were carriers of money and bank notes and checks for hire or recompense, or not. I agree, that it is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the company. And I farther agree, that it is by no means necessary, that if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining what the true understanding of the parties is, as to the character of the bailment.

In the next place, if it should turn out, that the Steamboat Company are not to be deemed common carriers of money and bank bills; still, if the master was authorized to receive money and bank bills as their agent, to be transported from one port of the route of the steamboat to another at their risk, as gratuitous bailees, or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank bills have been lost, the company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter; upon the plain ground, that they are responsible

for the gross negligence of their agents within the scope of their employment.

[Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, the Steamboat Company were not, nor held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandises, in the strict sense of the latter terms; the employment of the steamboat was, so far as the company are concerned, limited to the mere transportation of passengers and goods and merchandises on freight or for hire; and money and bank bills, although known to the company to be carried by the master, were treated by them, as a mere personal trust in the master by the owners of the money and bank bills, as their private agent, and for which the company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers. . . .

Judgment for defendant.[1]]

BUSSEY & CO. *v.* MISSISSIPPI VALLEY TRANSPORTATION CO.

SUPREME COURT OF LOUISIANA, 1872.

[24 *La. Ann.* 165.]

APPEAL from the Fourth District Court, parish of Orleans. HEARD, J.

HOWE, J. The plaintiffs, a commercial firm, sued the defendants, a corporation, whose business is to transport merchandise in their own model barges, and to tow the barges of other parties for hire between St. Louis and New Orleans.

The bill of lading, given by defendants to plaintiffs, recites the receipt from plaintiffs of one barge loaded with hay and corn, "in apparent good order in tow of the good steamboat 'Bee' and barges," "to be delivered without delay in like good order (the dangers of navigation, fire, explosion, and collision excepted) to Bussey & Co., at New Orleans, Louisiana, on levee or wharf boat, he or they paying freight at the rate annexed, or $700 for barge, and charges $267.50." . . . "It is agreed with shippers," the bill continues, "that the 'Bee' and barges are not accountable for sinking or damage to barge, except from gross carelessness."

It was alleged by plaintiffs that defendants had neglected to deliver the barge and her valuable cargo according to their contract. The defendants answered by a general denial, and by a recital of what they claimed to be the circumstances of the loss of the barge and cargo, in

which they contended they were without blame; and that loss did not result from gross carelessness on their part, and they were not liable under the bill of lading. Other defences were raised by the answer which have been abandoned.

The court *a qua* gave judgment for plaintiffs for the amount claimed as the value of the barge and cargo, $15,272.60, with interest from judicial demand, and defendants appealed.

The appellants contend, as stated in their printed argument,

"*First* — That they are not common carriers, or rather that their undertaking in this, or like cases, is not that of a common carrier.

"*Second* — That they are liable, if liable at all, only in case of gross carelessness.

"*Third* — That the restriction of liability contained in the agreement to tow the barge in question exonerates them, except in case of gross carelessness — as the appellants were bound to use but ordinary prudence, even if they were common carriers.

"*Fourth* — That the judgment rendered is for a larger amount than the testimony will authorize."

The question whether a towboat under the circumstances of this particular case is a common carrier has been long settled in the affirmative in Louisiana; and the reasoning by which Judge Matthews supported this conclusion in the leading case of Smith *v.* Pierce, 1 La. 354, is worthy of the sagacity for which that jurist was pre-eminent. The same opinion was clearly intimated by the Supreme Court of Massachusetts in the case of Sproul *v.* Hemmingway, 14 Pick. 1, in which Chief Justice Shaw was the organ of the court.

In the case also of Alexander *v.* Greene, 7 Hill, 533, the Court of Errors of New York seem to have been of the same opinion. Four of the senators in giving their reasons distinctly state their belief that the towboat in that case was a common carrier, and Judge Matthews' decision is referred to in terms of commendation as a precedent. It is true that Mr. Justice Bronson, whose opinion was thus reversed, in a subsequent case declares (2 Coms. 208) that nobody could tell what the Court of Errors did decide in Alexander *v.* Greene, but the facts remain as above stated, and the effect of the case cannot but be to fortify the authority of the decision in 1 La.

In addition to these authorities we have the weighty opinion of Mr. Kent who includes "steam towboats" in his list of common carriers, 2 Kent, 599, and of Judge Kane in 13 L. R. 399. On the other hand, Judge Story seems to be of a different opinion (Bailments, § 496), and Mr. Justice Grier differed from Judge Kane.

So, too, the Supreme Court of New York, in Caton *v.* Rumney, 13 Wend. 387, and Alexander *v.* Greene, 3 Hill, 9; the Court of Appeals of the same State in Well *v.* Steam Nav. Co., 2 Coms. 207; the Supreme Court of Pennsylvania in Leonard *v.* Hendrickson, 18 State, 40, and Brown *v.* Clegg, 63 State, 51; and the Supreme Court of Maryland in Penn. Co. *v.* Sandridge, 8 Gill & J. 248, decided that tugboats in these

particular cases were not common carriers. We are informed that the same decision was made in the case of the "Neaffie," lately decided in the United States Circuit Court in New Orleans.

Such conflict of authority might be very distressing to the student, but for the fact that when these writers and cases cited by them are examined the discrepancy, except in the decision in 63 Penn., is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed *termini*. Such were the facts in some form as stated or assumed in Caton *v.* Rumney, 13 Wend., and Alexander *v.* Greene, 3 Hill, cited by Judge Story in the case of the "Neaffie," and in the cases above quoted from 2 Coms., 18 Penn. St., and 8 Gill & J.; and it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed *termini*, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. Story on Bail. § 495. And it was probably to a towboat employed in this way that Mr. Kent referred in the passage quoted above; and that the Supreme Court of Massachusetts had in mind in the 14 Pick.; and see also Davis *v.* Housen, 6 Rob. 259, and Clapp *v.* Stanton, 20 An. 495. We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.

But conceding that this case as a contract of affreightment must be determined by the law of Missouri (4 Martin, 584), and that by that law the defendants are not common carriers as to the plaintiffs, we think it clear from the evidence of the defendants' own witnesses that they were guilty of "gross carelessness" in their attempt to deliver the plaintiffs' barge with its cargo at the port of New Orleans, and that by this gross carelessness she was sunk, and, with her cargo, destroyed.

What is "gross carelessness"? In an employment requiring skill, it is the failure to exercise skill. New World *v.* King, 16 How. 475. The employment of the defendants certainly required skill. A lack of that dexterity which comes from long experience only, might be swiftly fatal, for but a single plank intervenes between the costly cargo and instant destruction. We have but to read the testimony of defendants' own witnesses, and especially Conley, Turner, Burdeau, and Sylvester,

to see that the attempt to land the barge was made without skill, and that it might easily have been effected with entire safety.

We are of opinion that the judgment was correctly rendered in favor of plaintiffs, but that the amount is somewhat excessive. We find the value of the property lost at this port, less the freight and charges, and a small amount realized from the wreck, to be $13,268.50.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to the sum of thirteen thousand two hundred and sixty-eight dollars and fifty cents, with legal interest from judicial demand and costs of the lower court, and that as thus amended it be affirmed, appellees to pay costs of appeal.[1]

BUCKLAND *v.* ADAMS EXPRESS CO.

SUPREME COURT OF MASSACHUSETTS, 1867.

[97 *Mass.* 124[2].]

CONTRACT to recover the value of a case of pistols.

BIGELOW, C. J. We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. Dwight *v.* Brewster, 1 Pick. 50, 53; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; 2 Redfield on Railways, 1–16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any

[1] *Compare:* The Neaffie, 1 Abb. C. C. 465; White *v.* Winnisimmet Co., 7 Cush. 155; White *v.* Mary Ann, 6 Cal. 462. — ED.

care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such

limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfil the contracts into which he has entered.

Exceptions overruled.

CLARK *v.* BURNS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1875.

[118 *Mass.* 275.]

CONTRACT, for the value of a watch, against the owners of a steamship as common carriers, with counts in tort for negligence, and also counts charging them as innkeepers.[1]

GRAY, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing, hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. Steamboat Crystal Palace *v.* Vanderpool, 16 B. Mon. 302; Tower *v.* Utica Railroad, 7 Hill, 47; Abbott *v.* Bradstreet, 55 Maine, 530; Pullman Palace Car Co. *v.* Smith, 7 Chicago Legal News, 237.

PINKERTON *v.* WOODWARD.

SUPREME COURT, CALIFORNIA, 1867.

[33 *Cal.* 557.]

RHODES, J.[2] The definition of an inn, given by Mr. Justice Bayley, in Thompson *v.* Lacy, 3 B. & Ald. 286, as "a house where a travel-

[1] The evidence is omitted. Only so much of the opinion as discussed the liability of the defendants on the counts as innkeepers is given. — ED.

[2] Only so much of the opinion as describes the nature of an inn is given. — ED.

ler is furnished with everything which he has occasion for while on his way," is comprehensive enough to include every description of an inn; but a house that does not fill the full measure of this definition may be an inn. It probably would not now be regarded as essential to an inn that wine or spirituous or malt liquors should be provided for the guests. At an inn of the greatest completeness entertainment is furnished for the traveller's horse as well as for the traveller, but it has long since been held that this was not essential to give character to the house as an inn. (See Thompson v. Lacy, *supra;* 2 Kent, 595; 1 Smith Lead. Cases, notes to Coggs *v.* Bernard; Sto. on Bail. Sec. 475; Kisten *v.* Hildebrand, 9 B. Mon. 74.) In Wintermute *v.* Clarke, 5 Sandf. 247, an inn is defined as a public house of entertainment for all who choose to visit it. The defendant insists that the "What Cheer House" was a lodging house and not an inn; because, as he says, the eating department was distinct from the lodging department. It appears that in the basement of the "What Cheer House," and connected with it by a stairway, there was a restaurant, which was conducted by the defendant and two other persons jointly, and that the three shared the profits. Where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper, and in that capacity, is accustomed to receive travellers as his guests, and solicits a continuance of their patronage, and a traveller relying on such representations goes to the house to receive such entertainment as he has occasion for, the relation of innkeeper and guest is created, and the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper. The rules regulating the respective rights, duties and responsibilities of innkeeper and guest have their origin in considerations of public policy, and were designed mainly for the protection and security of travellers and their property. They would afford the traveller but poor security if, before venturing to intrust his property to one who by his agents, cards, bills, advertisements, sign, and all the means by which publicity and notoriety can be given to his business, represents himself as an innkeeper, he is required to inquire of the employees as to their interest in the establishment, or take notice of the agencies or means by which the several departments are conducted. The same considerations of public policy that dictated those rules demand that the innkeeper should be held to the responsibilities which, by his representations, he induced his guest to believe he would assume. We think the jury were fully warranted by the evidence in finding that the "What Cheer House" was an inn, and that the defendant was an innkeeper; and the Court correctly instructed the jury in respect to those facts.

LEWIS *v.* NEW YORK SLEEPING CAR CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1887.

[143 *Mass.* 267.]

MORTON, C. J. The use of sleeping cars upon railroads is modern, and there are few adjudicated cases as to the extent of the duties and liabilities of the owners of such cars. They must be ascertained by applying to the new condition of things the comprehensive and elastic principles of the common law. When a person buys the right to the use of a berth in a sleeping car, it is entirely clear that the ticket which he receives is not intended to, and does not, express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket.

Ordinarily, the only communication between the parties is, that the passenger buys, and the agent of the car company sells, a ticket between two points; but the contract thereby entered into is implied from the nature and usages of the employment of the company.

A sleeping car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger such as he might reasonably carry with him are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the company; and the decided weight of authority supports it. Woodruff Sleeping & Parlor Coach Co. *v.* Diehl, 84 Ind. 474; Pullman Car Co. *v.* Gardner, 3 Penny. 78; Pullman Palace Car Co. *v.* Gaylord, 23 Am. Law Reg. (N. S.) 788.

The notice by which the defendant company sought to avoid its liability was not known to the plaintiff, and cannot avail the defendant.

The defendant contends that there was no evidence of negligence on

its part. The fact that two larcenies were committed in the manner described in the testimony is itself some evidence of the want of proper watchfulness by the porter of the car; add to this the testimony that the porter was found asleep in the early morning, that he was required to be on duty for thirty-six hours continuously, which included two nights, and a case is presented which must be submitted to the jury.

We have considered all the questions which have been argued in the two cases before us, and are of opinion that the rulings at the trial were correct. *Exceptions overruled.*[1]

Gray, C. J., in Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299 (1873). The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself.

CUMBERLAND TELEPHONE CO. *v.* BROWN.

Supreme Court of Tennessee, 1900.

[104 *Tenn.* 56.]

Caldwell, J.[2] Brown was a resident of the city of Nashville, but was temporarily at Hickman, a small village about fifty-eight miles from Nashville, and two miles beyond Gordonsville. The telephone company had an office at Nashville and one at Gordonsville, but none at Hickman.

In the afternoon of September 16, 1897, Brown's son went into the office at Nashville and stated to the operator there that he had an im-

[1] *Acc.* Blum *v.* So. P. P. C. Co., 1 Flip. 500; Pullman P. C. Co. *v.* Adams, 120 Ala. 581; Pullman P. C. Co. *v.* Smith, 73 Ill. 360; Woodruff S. & P. C. Co. *v.* Diehl, 84 Ind. 474. *Contra*, Pullman P. C. Co. *v.* Lowe, 28 Neb. 239. — Ed.

[2] Part of the opinion only is given. — Ed.

portant message for his father at Hickman. The operator called the company's agent at Gordonsville, and put the son in communication with him. The son, availing himself of the instrument and connection thus afforded, communicated his message to the Gordonsville agent, who agreed to deliver it at Hickman; and thereupon, according to the usual custom, the Nashville agent demanded and received sixty-five cents in payment of total charges, being twenty-five cents for the transmission of the message to Gordonsville and forty cents for its delivery at Hickman. The message, as written by the agent at Gordonsville, was as follows:

"NASHVILLE, TENNESSEE, 9–16–97.

"Mr. J. Thomas Brown, Hickman, Tennessee.

"Come home immediately. Your daughter is dangerously ill.

"(Signed) TOM BROWN."

Though received at Gordonsville at 5.15 P. M. of that day, and so marked on its face, the message was not delivered until about 8 or 8.30 A. M. the next day, which was near fifteen hours after the agent got it, and some five hours after the sendee's daughter's death, of which he learned thirty minutes later through another message transmitted over the same line, and likewise delivered at Hickman.

The company virtually concedes the foregoing facts; but, nevertheless, denies its liability in this case upon the ground that it had instructed its operators not to receive messages from any one to be by any agent of the company delivered to the sendee, and that the undertaking of the Gordonsville operator to deliver this message at Hickman was, therefore, without authority, and not binding on his principal.

It was in relation to this phase of the case that the trial judge gave the charge against which the first assignment of error in this court is directed. That charge is in this language, namely: "In the opinion of the court this instruction to employees is of little consequence, under the conceded facts of this case. If the company knowingly permitted its employees, over its own wires, to make such arrangements with customers, ascertained from such employees the cost of delivery beyond the terminus of the line, and there collected from the customer compensation for the entire work, then the fact that under its arrangement with its distant operators they were to receive the pay for the delivery beyond the terminus, could make no difference so far as the customer was concerned; and the negligence of such operator, if proven, would be the negligence of the company itself."

We are not able to perceive any error in this charge, but on the contrary we regard it as entirely sound.

No instruction of the company to its operators, however formal and peremptory, could prejudice the rights of a customer if it knowingly permitted those agents to conduct its affairs upon a plan in direct conflict with that instruction. The course of business actually pursued by

the company's agents with its knowledge is the proper and legal criterion of its responsibility to its customers. As to the public its legal relation is that indicated by its recognized course of business, so long as the latter does not contravene some rule of positive law or some public policy.

The habitual breach and disregard of the instruction by the operators of the company, with its knowledge, amounts to a practical abrogation of the instruction (Railroad *v.* Reagan, 96 Tenn. 129, 140), and makes the status of the company that which its real course of business imports.

This is equally true, though the company was not bound in the first instance to receive and deliver messages at all, but only to furnish suitable instrumentalities for verbal communication between separated members of the public; for, it had the legal power to assume the additional duty, and could do so as well in the manner indicated as by the promulgation of formal notice of such purpose.

Nor is it of any legal consequence in the present case that the Nashville operator may have testified that he told the sender of this message that the company would not undertake to deliver it, since he concedes that he furnished the connection with the express understanding that the Gordonsville operator was to be requested to deliver it, and with the assurance that he would do whatever he agreed to do about it, and after the arrangement was consummated, collected the charges for delivery as well as for tolls, and turned the same into the treasury of the company.

The formal statement that the company would not undertake to deliver the message, if made, must go for nothing in the face of the undisputed facts which show that it did in reality, and according to its custom, undertake and agree by its Gordonsville agent to do it.

SEAVER *v.* BRADLEY.

SUPREME COURT OF MASSACHUSETTS, 1901.

[179 *Mass.* 329.]

TORT under Pub. Sts. c. 73, § 6, to recover for the loss of life of the plaintiff's intestate by reason of the negligence of the defendant, alleged to be a common carrier of passengers, operating a passenger elevator in the building owned and managed by him as trustee numbered 171 A on Tremont Street in Boston. Writ dated December 7, 1898.

HOLMES, C. J. Those who maintain a passenger elevator in an office building are not "common carriers of passengers" within the meaning of Pub. Sts. c. 73, § 6. We assume that that section is not prevented from applying because it represents a statute passed before such elevators were in familiar use. But the words do not describe the owners of

an elevator. The modern liability of common carriers of goods is a resultant of the two long accepted doctrines that bailees were answerable for the loss of goods in their charge, although happening without their fault, unless it was due to the public enemy, and that those exercising a common calling were bound to exercise it on demand and to show skill in their calling. Both doctrines have disappeared, although they have left this hybrid descendant. The law of common carriers of passengers, so far as peculiar to them, is a brother of the half blood. It also goes back to the old principles concerning common callings. Carriers not exercising a common calling as such are not common carriers whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him. Apart from that consideration, manifestly it would be contrary to the ordinary usages of English speech to describe by such words the maintaining of an elevator as an inducement to tenants to occupy rooms which the defendant wished to let.

The only question before us is the meaning of words. Therefore decisions that the liability of people in the defendant's position is not less than that of railroad companies do not go far enough to make out the plaintiff's case. *Exceptions overruled.*

NOLTON *v.* WESTERN RAILROAD CORPORATION.

COURT OF APPEALS, NEW YORK, 1857.

[15 *N. Y.* 444.]

DEMURRER TO COMPLAINT. The complaint stated that the plaintiff was a mail agent on the defendant's railroad, in the employment of the United States, and the defendant a carrier of passengers and freight, for fare and reward, by railroad and cars, between Greenbush and Boston. That defendant was bound by contract between it and the United States, for a stipulated time and price, to carry the mails, and also the mail agent, without further charge; that in pursuance and in consideration of such contract, the defendant received the plaintiff into a car fitted up for the accommodation of the mail and mail agent; and the plaintiff, for the consideration aforesaid, became and was a passenger in the said cars, to be by the defendant, thereby, safely and with due care and skill, carried and conveyed to Worcester, which the defendant then and there undertook and was bound to do. It then states a bodily injury received by the plaintiff, by the running of the car, containing the plaintiff, off the track, and breaking it, through defectiveness of machinery, want of care, skill, &c. The defendant demurred, and after final judgment for the plaintiff, by the Supreme Court at gen-

eral term, appealed to this court. The case was submitted on printed briefs.

SELDEN, J. As the only objection which can be taken to the complaint upon this demurrer is, that it does not contain facts sufficient to constitute a cause of action, it is entirely immaterial whether the action be considered as in form *ex contractu* or *ex delicto*. The only question is, whether upon the facts stated, the plaintiff can maintain an action in any form.

The plaintiff cannot, I think, avail himself of the contract between the defendant and the government, so as to make that the gravamen of his complaint, and the foundation of a recovery. This is not like the cases in which a third person has been permitted to recover upon a contract made by another party for his own benefit. The distinction between them is plain. Those were cases where the defendant, for a consideration, received from the party to the contract, had undertaken to do something ostensibly and avowedly, for the direct benefit of the plaintiff, and when the advantage to the latter was one object of the agreement. Here the parties had no such intention. In contracting for the transportation of the mail agent, the parties had no more in view any benefit or advantage to him, than if the contract had been to transport a chattel. The government took care of the public interests, and left those of the mail agent to such protection as the law would afford.

Another distinction is, that in the cases referred to, the party claiming the benefit of the contract, and seeking to enforce it, was one who was specifically mentioned and pointed out in the contract itself, while here no one is designated; and to entitle the plaintiff to recover upon it, it must be regarded as a shifting contract, which can be made to enure to the benefit of any person who may temporarily assume the duties of mail agent. I think there is no precedent for such a construction of such a contract.

If, then, the plaintiff can recover at all, it must be upon the ground of some implied contract, or of some legal obligation or duty resting upon the defendants, to exercise proper care and skill in the transportation of passengers; and the question is, whether, under the circumstances of this case, such a contract is implied, or such a duty imposed for the benefit of the plaintiff.

It would seem a startling proposition, that in all those cases where persons travel upon railroads engaged not in their own business, but that of others, and where their fare is paid by their employer, they are entirely at the mercy of the railroad agents, and without redress, if injured through their recklessness and want of care and skill. If, however, railroad companies are liable, in cases like the present, it is important to ascertain the precise nature and extent of that liability.

In the first place, then, it is clear that they are not liable, by virtue of that custom or rule of the common law, which imposes special and peculiar obligations upon common carriers. Persons engaged in the

conveyance of passengers, are not common carriers, within the meaning of that rule, which applies solely to those whose business it is to transport goods. (Bac. Abr., tit. Carriers ; 2 Kent's Com., § 40 ; Story on Bail., § 498, and note.)

If the complaint in this case, after stating that the defendant was a carrier of passengers and freight from Greenbush to Boston, for hire and reward, had simply averred that the plaintiff became a passenger in the cars of the defendant, and was so received by it; an implied contract would have arisen on the part of the defendant, to transport the plaintiff with all due diligence and skill; because the law would have inferred from those facts, that the defendant was to receive a compensation from the plaintiff himself. But this inference is repelled by the contract set forth, and the statement that the plaintiff was received as a passenger under it.

It was suggested by the plaintiff's counsel, upon the argument, that a contract might be implied, of which the agreement between the defendant and the government should form the consideration and basis. But although that agreement may be resorted to, for the purpose of showing that the plaintiff became a passenger upon the cars by the consent of the defendant, and not as a mere intruder, it cannot, I think, be made available by the plaintiff, as the consideration of an implied assumpsit. As to him, that agreement is *res inter alios acta*. He is not a party to it, or mentioned in it. His employment by the government may have taken place long after the agreement was made, and have had no reference to it. If any contract can be implied from that agreement, in favor of the plaintiff, it must be a contract to transport him from place to place, according to the terms of the agreement. Suppose, then, the cause of action, instead of being for an injury received through the negligence of the defendant, had been for not furnishing the necessary cars, or not running any train, could the plaintiff recover in such an action? Would the defendant be liable for its failure to perform the contract, not only to the party with whom the contract was made, and from whom the consideration was received, but to a third party not named in it, and from whom they had received nothing? No one would claim this.

It may be said that the implied contract with the plaintiff, is limited to an undertaking to transport safely or with due care. It is difficult to see, however, how there can be a contract to transport safely where there is no contract to transport at all. My conclusion therefore is, that this action cannot be maintained upon the basis of a contract express or implied.

It necessarily follows, that it must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject, is that of Coggs *v.* Bernard (Ld. Ray. 909). There the defendant had undertaken to take several

hogsheads of brandy belonging to the plaintiff, from one cellar in London, and to deposit them in another; and in the process of moving, one of the hogsheads was staved and the brandy lost, through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive anything for his services, he was, nevertheless, held liable by the whole court.

The principle of this case has never since been doubted, but there has been some confusion in the subsequent cases as to the true nature of the obligation, and as to the form of the remedy for its violation. In many instances suits have been brought, upon the supposition that an implied contract arises, in all such cases, that the party will exercise due care and diligence; and the language of Lord HOLT, in Coggs *v.* Bernard, undoubtedly gives countenance to this idea. He seems to treat the trust and confidence reposed, as a sufficient consideration to support a promise. This doctrine, however, can hardly be considered as in consonance with the general principles of the common law. In addition to the difficulty of bringing mere trust and confidence within any legal definition of valuable consideration, there is a manifest incongruity in raising a contract, to do with care and skill, that which the party is under no legal obligation to do at all.

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially, in its nature, from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury; or upon one who digs a ditch for some lawful purpose in a highway, and carelessly leaves it uncovered at night, to the injury of some traveller upon the road. It is true, it may be said that, in these cases, the duty is to the public, while in the present case, if it exists at all, it is to the individual; but the basis of the liability is the same in both cases, viz., the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence, where there was no legal obligation to use care, as where a man digs a pit upon his own land, and carelessly leaves it open, affords no ground of action. But where there is anything in the circumstances to create a duty, either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property, and a similar undertaking to transport a person. If either are injured through the culpable carelessness of the carrier, he is liable. If, according to the case of Coggs *v.* Bernard (*supra*), and the subsequent cases, an obligation to exercise care arises in one case, it must also in the other.

It is true that, according to the authorities, the party in such cases is only liable for gross negligence. But what will amount to gross negli-

gence depends upon the special circumstances of each case. It has been held that, when the condition of the party charged is such as to imply peculiar knowledge and skill, the omission to exercise such skill is equivalent to gross negligence. Thus, it was said by Lord LOUGHBOROUGH, in Shiells *v.* Blackburne (1 Hen. Bl., 158), that "if a man *gratuitously* undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

The same doctrine is advanced by PARKE, B., in Wilson *v.* Brett (11 Mees. & Wels., 113). He says: "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

I regard this principle as peculiarly applicable to railroad companies, in view of the magnitude of the interests which depend upon the skill of their agents, and of the utter powerlessness of those who trust to that skill to provide for their own security.

This case is not like that of Winterbottom *v.* Wright (10 Mees. & Wels., 109). There the defendant had not undertaken to transport the plaintiff, either gratuitously or otherwise. He was simply bound by contract with the government to furnish and keep in repair the carriages used by the latter in transporting the mails. The relations of the parties in that case and in this are very different, and the cases cannot be considered as governed by the same principles.

I entertain no doubt that in all cases where a railroad company voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, in the absence, at least, of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, the latter is liable. The matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question, however, does not arise here. Degrees of negligence are matters of proof, and not of averment. The allegations of negligence in this complaint are sufficient, whether the defendant is liable for ordinary or only for gross negligence.

The judgment should be affirmed.

BROWN, J., also delivered an opinion for affirmance.

All the judges concurring. *Judgment affirmed.*

SEASONGOOD *v.* TENNESSEE & OHIO TRANSPORTATION COMPANY.

COURT OF APPEALS OF KENTUCKY, 1899.

[54 *S. W.* 193[1].]

GUFFY, J. The principal grounds relied on by appellants for a reversal are as to the instructions given and refused. It will be seen from the pleadings (and the testimony conduces to prove the same) that one McGrew was the owner of a warehouse at the mouth of Hurricane creek, which was the only point at which the goods were delivered to and from steamboats in that immediate vicinity, and that it was the custom of appellee, as well as other boats, to receive freight from said warehouse, and that McGrew was furnished blank bills of lading, and collected freight bills. The collection, however, was done at the cost of the debtors. He was also employed by appellee to carry the United States mail from the steamboat landing to the post office at Tolou. It appears from the testimony that on a certain evening appellee's boat landed at the landing aforesaid, and that the clerk of the boat asked McGrew what he had, and McGrew replied that he had "some chickens and eggs for Evansville, and a box for Cincinnati, and do you want them?" The clerk replied, in substance, that he would take the chickens and eggs, but would not take the box; that appellee had an arrangement with another company that carried freight between New Orleans and Cincinnati not to take freight to any point beyond Evansville, and that the other company would not take freight within the boundary between Evansville and Cairo or Paducah; and it further appears that the goods were stolen the same night that appellee refused to take them. It is the contention of appellee that it was not required by law to accept the box tendered, for the reason, as now relied on, that it could not be required to receive freight destined to a point beyond the end of its own line, which it appears in this case was Evansville, Ind. It is true that the appellee was not bound to undertake to deliver the box to the consignee at Cincinnati, but it was its duty to accept the box, if tendered to it as a common carrier; for it was then its duty to carry the same to the end of its line, and there deliver, or offer to deliver, the box to some common carrier engaged in such business, to be by it forwarded or carried to Cincinnati. It is clear that the agreement between appellee and the other company did not furnish any excuse for its failure to receive the goods. Such an agreement is illegal and not enforceable even between parties thereto. Much less can it excuse a party for refusing to discharge its duty as a common carrier as to the third party. Anderson *v.* Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.[2]

[1] The principal point is printed. — ED.

[2] See Western Union Telegraph Co. *v.* Simmons (Tex. Civ. App.), 93 S. W. 688. — ED.

BENNETT *v.* DUTTON.

SUPREME COURT OF NEW HAMPSHIRE, 1839.

[10 *N. H.* 481.]

CASE. The declaration alleged that the defendant was part owner, and driver, of a public stage coach, from Nashua to Amherst and Francestown — that on the 31st January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence that at the time of the grievance alleged there were two rival lines of daily stages, running between Lowell, in Massachusetts, and Nashua — that Jonathan B. French was the proprietor of one of these lines, and Nelson Tuttle of the other — that Tuttle's line ran no farther than from Lowell to Nashua — that French and the proprietors of the defendant's line were interested in a contract for carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown — that French and the proprietors of the defendant's line had agreed to run their respective coaches so as to form a continuous line for passengers from Lowell, through Amherst, to Francestown, and that their agents and drivers might engage seats for the whole distance, at such rates of fare as they thought expedient; and the amount thus received, in instances where they thought proper to receive less than the regular fare, was to be divided between said proprietors, in proportion to the length of their respective routes — that it was also agreed that if the defendant's line brought down to Nashua an extra number of passengers, French should see them through, and be at the expense of furnishing extra coaches and horses, if necessary, to convey them to Lowell; and, on the other hand, if French's line brought up an extra number of passengers from Lowell to Nashua, the proprietors of the defendant's line were to do the same, for the conveyance of such passengers above Nashua — and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line, that they would not receive into their coaches, at Nashua, passengers for places above Nashua, who came up from Lowell to Nashua on the same day, in Tuttle's line; the time of starting from Lowell and arriving at Nashua being the same in both lines.

One of the requisitions of mail contracts is, that each line of stage coaches running into another, so as to form a continuous mail line, shall give preference to passengers arriving in the line with which it connects, and shall forward them in preference to any others.

There were several other lines which started from Lowell at the same time with the lines before mentioned, running to other places, through

Nashua; and it was generally the understanding between their respective proprietors that one line should not take, for a part of the distance where the route was the same, passengers who were going on further in another line; though this understanding had been occasionally interrupted.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

The plaintiff was notified by the agent for the line of French and the defendant, at Lowell, previous to taking passage in Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day, in the regular mail line, he must take the mail line at Lowell; and that if he took passage in Tuttle's line from Lowell to Nashua he would not be received at Nashua into the defendant's coach.

The parties agreed that judgment should be rendered for the plaintiff for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

Clark & G. Y. Sawyer, for the plaintiff, cited Story on Bailment, 380; 2 Ld. Raym. 909, Coggs *v.* Bernard; Jones on Bailment, 109; 2 Barn. & Adolph. 803, Kent *v.* Shuckard.

Baker (with whom was *C. G. Atherton*), for the defendant. It is not denied that anciently a common carrier was liable for refusing to carry goods; a common innkeeper for refusing to receive a guest; a common ferryman for refusing to carry a passenger; and generally, perhaps, that there was an implied obligation upon every one standing before the public in a particular profession or employment to undertake the duties incumbent upon it; though no case is recollected in which it has been determined that the proprietor of a stage coach is liable for refusing to receive a passenger. 2 Black. 451; 3 Black. 165; 1 Bac. Ab. 554; 1 Vent. 333; 2 Show. 327; Hard. 163; Rob. Ent. 103.

Formerly it was held that where a man was bound to any duty, and chargeable to a certain extent by operation of law, he could not, by any act of his own, discharge himself (1 Esp. R. 36; Noy's Maxims, 92; Doc. & Stud. 270), though it is now well settled that this obligation may be limited.

A liability for refusing to receive a passenger may be qualified by notice. Without notice a common carrier stands in the situation of an insurer. This obligation the law imposes upon him the moment he takes upon himself the duties of carrier. His contract with the public is as an insurer; and if goods are committed to his care while standing in this relation, he is liable as such. 6 Johns. 160; 3 Esp. 127; Selw. N. P. 395; 1 Wils. 181; 1 Inst. 89; 1 T. R. 33, 57; 5 T. R. 389; Story on Bailment, 328; 11 Pick. 42; 4 N. H. Rep. 306.

But this contract, which is general with the public, may be made

special. One who proposes to carry goods may undertake the business, not of a common, but of a special, carrier. He may give notice, when he commences business, that he does not assume all the responsibilities of a common carrier, technically so called; that he will be liable to a certain extent, and upon certain conditions, and no farther. He may thus discharge himself from all responsibility, except perhaps in cases of gross negligence. 3 Stark. 337; 3 Camp. 27; Story on Bail. 338, 357; 3 Taunt. 271; 4 Camp. 41; Jones on Bail. 104; 6 East, 564; 4 Esp. 178; 1 H. Black. 298. But the carrier is not liable for refusing to receive what he is under no obligation to carry (16 East, 244), so that the carrier of goods may not only qualify his responsibility for the safe transportation of goods, but his liability for refusing to receive them.

The principle to be derived from these cases, and upon which they all rest, is, that although the law imposes certain obligations upon one who undertakes the duties of a particular profession or employment, he is at liberty to assume those duties but in part, and thus limit his responsibility, provided he gives notice of his intention, generally, and that notice is brought home to the knowledge of the party interested. The principle is confined to no one branch or department of business; to no one case or class of cases. Nothing more is required than that public notice should be given how far the carrier intends to limit his responsibility, and that it should be known to the person to be affected by it in season to save his interest. The main point is to show the intention of the carrier, and to communicate knowledge of his terms, seasonably, to the individual interested. 5 East, 510; 2 Camp. 108; 1 Stark. Cas. 418; 2 Ditto, 461; 4 Burr. 2298; 1 Str. 145; 1 Bac. Abr. 556; 2 Stark. Ev. 338; 1 Pick. 50. And, provided the intention be manifest, it is not material whether any other person may have known the conditions, except the party whose interest they may affect. 1 Str. 145; 4 Burr. 2298; 2 Stark. Cas. 461.

But, yielding these points, it is contended that the defendant is not liable. It was competent for him to make all such rules and regulations as might be necessary for the convenient and successful prosecution of the employment in which he was engaged. To prosecute this employment, to discharge his duties to the public, and particularly to the post-office department, it became necessary that some such arrangement as this should be made. It was as proper that he should prescribe the place where a passenger should be received as the time when he should be received. It was not a refusal to receive all passengers, or this one in particular, but merely the regulation of the mode in which they would be received. Persons going from Nashua to Francestown were received at Nashua. Persons going from Lowell to Francestown were received at Lowell. This was all that the defendant did. It was a mere regulation; not a refusal to discharge a duty imposed by law.

PARKER, C. J. It is well settled that so long as a common carrier has convenient room he is bound to receive and carry all goods which

are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition. Story on Bailment, 328; 5 Bing. R. 217, Riley *v.* Horne.

And stage coaches, which transport goods as well as passengers, are, in respect of such goods, to be deemed common carriers, and responsible accordingly. Story, 325.

Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stage coach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. 2 Sumner, 221; Jencks *v.* Coleman; 19 Wend. R. 239.

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. 8 N. H. Rep. 523, Markham *v.* Brown. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stage coach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach, and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages, from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case or class of cases, on account of their agreement with French.

It is further contended, that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell, and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided in New York that stage coach proprietors are answerable, as common carriers, for the baggage of passengers, that they cannot restrict their common law liability by a general notice that the baggage of passengers is at the risk of the owners, and that if a carrier can restrict his common law liability, it can only be by an express contract. 19 Wend. 234, Hollister *v.* Nowlen. And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. 19 Wend. 251, Cole *v.* Goodwin. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD *v.* DENVER AND NEW ORLEANS RAILROAD.

SUPREME COURT OF THE UNITED STATES. 1884.

[110 *U. S.* 667.]

BILL in equity by the Denver & New Orleans Railroad Company, owning and operating a railroad between Denver and Pueblo, about one hundred and twenty-five miles, against the Atchison, Topeka & Santa Fé Railroad Company, a Kansas corporation, owning and operating a railroad in that State from the Missouri River, at Kansas City, westerly to the Colorado State line, and also operating from there, under a lease, a road in Colorado from the State line to Pueblo, built by the Pueblo & Arkansas Valley Railroad Company, a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa Fé Company formed a continuous line of communication from Kansas City to Pueblo, about six hundred and thirty-four miles. The general purpose of the suit was to compel the Atchison, Topeka & Santa Fé Company to unite with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Den ver over the Denver & New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage and interchange of cars, that were or might be customary with connecting roads, or that were or might be granted to the Denver & Rio Grande Railroad Company, another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo, or to any other railroad company competing with the Denver & New Orleans

It appeared that when the Atchison, Topeka & Santa Fé Company reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The Atchison, Topeka & Santa Fé Company, being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Company for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates. The object of the parties was to establish a new line, which could be worked with rapidity and economy, in competition with the old ones.

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three-quarters of a mile from the union depot at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchanged their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver &

New Orleans Company erected, at its junction with the Atchison, Topeka & Santa Fé, platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé, as follows:

"That through bills of lading be given via your line and ours, and that you allow all freight consigned via D. & N. O. R. R. to be delivered this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the D. & N. O. R. R., to be delivered to this company and hauled to destination in same manner as interchanged with any other line. That you allow tickets to be placed on sale between points on line of D. & N. O. R. R. and those on line of A. T. & S. F. R. R., or reached by either line; that a system of through checking of baggage be adopted; that a transfer of U. S. mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements."

This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company. . . .

Upon this state of facts the Circuit Court entered a decree requiring the Atchison, Topeka & Santa Fé Company to stop all its passenger trains at the platform built by the Denver & New Orleans Company where the two roads joined, and to remain there long enough to take on and let off passengers with safety, and to receive and deliver express matter and the mails. It also required the Atchison, Topeka & Sante Fé Company to keep an agent there, to sell tickets, check baggage, and bill freight. All freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered, if proper notice was given. While the Atchison, Topeka & Santa Fé Company was not required to issue or recognize through bills of lading embracing the Denver & New Orleans road in the route, or to sell or recognize through tickets of the same character, or to check baggage

in connection with that road, it was required to carry freight and passengers going to or coming from that road at the same price it would receive if the passenger or freight were carried to or from the same point upon a through ticket or through bill of lading issued under any arrangement with the Denver & Rio Grande Company or any other competitor of the Denver & New Orleans Company for business. In short, the decree, as entered, establishes in detail rules and regulations for the working of the Atchison, Topeka & Santa Fé and Denver & New Orleans roads, in connection with each other as a connecting through line, and, in effect, requires the Atchison, Topeka & Santa Fé Company to place the Denver & New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and perhaps the compulsory interchange of cars.

From this decree both companies appealed; the Atchison, Topeka & Santa Fé Company because the bill was not dismissed; and the Denver & New Orleans Company because the decree did not fix the rates to be charged by the Atchison, Topeka & Santa Fé Company for freight and passengers transported by it in connection with the Denver & New Orleans, or make a specific division and apportionment of through rates between the two companies, and because it did not require the issue of through tickets and through bills of lading, and the through checking of baggage.

Mr. H. C. Thatcher, *Mr. Charles E. Gast*, *Mr. George R. Peck*, and *Mr. William M. Evarts* for the Atchison, Topeka & Santa Fé Railroad Company.

Mr. E. T. Wells for the Denver & New Orleans Railroad Company.

Mr. Chief Justice Waite delivered the opinion of the court.[1] After reciting the facts in the foregoing language he continued:

The case has been presented by counsel in two aspects:

1. In view of the requirements of the Constitution of Colorado alone; and

2. In view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that sec. 6 of art. 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The Constitution has taken from the legislature the power of abolishing this rule as applied to railroad companies.

So in sec. 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall have the right with its road to intersect, connect with, or cross any

[1] Part of the opinion is omitted. — Ed.

other railroad." Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver & New Orleans Company is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way, decided upon by the Denver & New Orleans Company for itself, and the Atchison, Topeka & Santa Fé Company does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the Constitution of Colorado, the Denver & New Orleans Company has a constitutional right, which a court of chancery can enforce by a decree for specific performance, to form the same business connection, and make the same traffic arrangement, with the Atchison, Topeka & Santa Fé Company as that company grants to, or makes with, any competing company operating a connected road.

The right secured by the Constitution is that of a connection of one road with another, and the language used to describe the grant is strikingly like that of sec. 23 of the charter of the Baltimore & Ohio Railroad Company, given by Maryland on the 28th of February, 1827, Laws of Maryland, 1826, c. 123, which is in these words:

"That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route, to any other part or parts of the State."

At the time this charter was granted the idea prevailed that a railroad could be used like a public highway by all who chose to put carriages thereon, subject only to the payment of tolls, and to reasonable regulations as to the manner of doing business, *Lake Sup. & Miss. R. R. Co.* v. *United States*, 93 U. S. 442; but that the word "connect," as

here used, was not supposed to mean anything more than a mechanical union of the tracks is apparent from the fact that when afterwards, on the 9th of March, 1833, authority was given the owners of certain factories to connect roads from their factories with the Washington branch of the Baltimore & Ohio Company, and to erect depots at the junctions, it was in express terms made "the duty of the company to take from and deliver at said depot any produce, merchandise, or manufactures, or other articles whatsoever, which they (the factory owners) may require to be transported on said road." Maryland Laws of 1832, c. 175, sec. 16. The charter of the Baltimore & Ohio Company was one of the earliest ever granted in the United States, and while from the beginning it was common in most of the States to provide in some form by charters for a connection of one railroad with another, we have not had our attention called to a single case where, if more than a connection of tracks was required, the additional requirement was not distinctly stated and defined by the legislature.

Legislation regarding the duties of connected roads because of their connection is to be found in many of the States, and it began at a very early day in the history of railroad construction. As long ago as 1842 a general statute upon the subject was passed in Maine, Stats. of Maine, 1842, c. 9; and in 1854, c. 93, a tribunal was established for determining upon the "terms of connection" and "the rates at which passengers and merchandise coming from the one shall be transported over the other," in case the companies themselves failed to agree. Other States have made different provisions, and as railroads have increased in number, and their relations have become more and more complicated, statutory regulations have been more frequently adopted, and with greater particularity in matters of detail. Much litigation has grown out of controversies between connected roads as to their respective rights, but we have found no case in which, without legislative regulation, a simple connection of tracks has been held to establish any contract or business relation between the companies. . . .

To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "intersect, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of the case, to wit, the relative rights of the two companies at common law and under the Constitution, as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject.

The Constitution expressly provides:

1. That all shall have equal rights in the transportation of persons and property;

2. That there shall not be any undue or unreasonable discrimination in charges or facilities; and

3. That preferences shall not be given in furnishing cars or motive power.

It does not expressly provide:

1. That the trains of one connected road shall stop for the exchange of business at the junction with the other; nor

2. That companies owning connected roads shall unite in forming a through line for continuous business, or haul each other's cars; nor

3. That local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor

4. That if one company refuses to agree with another owning a connected road to form a through line or to do a connecting business a court of chancery may order that such a business be done and fix the terms.

The question, then, is whether these rights or any of them are implied either at common law or from the Constitution.

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeko & Santa Fé Company just as any other customer does, and

with no more rights. It has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case, the Atchison, Topeka & Santa Fé and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop

at the junction of the Denver & New Orleans, was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be in effect to declare that every railroad company which forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Company to carry for the Denver & New Orleans when passengers go to or freight is delivered at the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price.

That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Company to the Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through

rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande. . . .

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping-places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider.

We have not referred specially to the tripartite agreement or its provisions, because, in our opinion, it has nothing to do with this case as it is now presented. The question here is whether the Denver & New Orleans Company would have the right to the relief it asks if there were no such contract, not whether the contract, if it exists, will be a bar to such a right. The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the Circuit Court is reversed, and the cause remanded with direction to *Dismiss the bill without prejudice.*

ILWACO RAILWAY & NAVIGATION COMPANY *v.* OREGON SHORT LINE & UTAH NORTHERN RAILWAY.

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, 1893.

[57 *Fed.* 673.]

McKENNA, Circuit Judge.[1] The plaintiff contends that defendant, by preventing it from landing its boats at a wharf owned and used by defendant, discriminates against it, contrary to section 3 of the Interstate Commerce Act.

The facts are as follows: —

That prior to the month of August, 1888, the defendant was named the Ilwaco Steam Navigation Company, but in that month it filed supplemental articles of incorporation, changing its name to Ilwaco Railway & Navigation Company, and proceeded to construct a line of railway from a point at or near the town of Ilwaco on the Pacific Ocean, in the State of Washington, to a point on the navigable waters of Shoal Water Bay, in Pacific County. That the construction of said railway was commenced before, but completed after, the filing of said supplemental articles. That prior to the construction of said railroad line the defendant owned and operated a line of steamboats between the town of Astoria, Or., and the town of Ilwaco. That the shores of the Pacific Ocean in that vicinity were popular summer resorts during the months of July and August and the first week of September. That prior to 1888 the Oregon Railway & Navigation Company owned the boats and line between Astoria and Portland, Or., which plaintiff now owns, and carried passengers from Portland to Astoria, which were then transferred to plaintiff's boats, and carried to Ilwaco, from whence they went to the ocean beach in wagons. That in the summer season of the years 1888, 1889, 1890, and 1891 the Oregon Railway & Navigation Company asked and obtained permission to land its passengers on the wharf at Ilwaco, paying a compensation therefor. That complainant only ran its boats during said summer months, and only while people were travelling to said summer resorts. Said town of Portland, Or., is situated on the Willamette River, about 100 miles inland, easterly from the said city of Astoria, which latter city is situated on the left bank of the Columbia River, and about 12 miles inland from the ocean; and the town of Ilwaco is situated on the right bank of the Columbia River, at a part thereof known as "Baker's Bay," and about 15 miles distant, in a northwesterly direction, from said city of Astoria. That in the year 1892 complainant desired the same privileges, but respondent refused. . . .

The defendant company was organized for the purpose of constructing a transportation route from Astoria, Or., to Shoal Water Bay,

[1] Part of the opinion is omitted. — ED.

Wash. Its means of transportation are steamboats and a railroad. The wharf at Ilwaco makes the connection between them, and the continuity of the route. The act contemplates, we think, independent carriers, capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

We do not think that the cases cited by appellee militate with these views, nor do they justify a railroad company combining with its proper business a business not cognate to it, and discriminating in favor of itself, as it might in counsel's illustration of a combination of a railroad company with the Standard Oil Company, or as illustrated in the cases of Baxendale *v.* Great Western Ry. Co., 1 Railway & Canal Traffic Cas. 202; Same *v.* London & S. W. Ry. Co., Id. 231; and Parkinson *v.* Railway Co., Id. 280. In all these cases the railroad company attempted to discriminate in favor of itself as carrier, separate from its capacity as a railway carrier. We find no difficulty of concurring in these cases, and distinguishing them from the case at bar. It was not to engage in the business of drayman, as Cockburn, C. J., indicates in the first case, that great powers have been given to railway companies, and, if permitted to be so used, might indeed be converted into a means of very grievous oppression. The principle of these cases does not extend to boats owned by railroads, as a part of a continuous line. Nor do we think the case, Indian River Steamboat Co. *v.* East Coast Transp. Co. (Fla.), 10 South. Rep. 480, sustains complainant. It was a case of discrimination. The action was between two competing steamboat companies, in favor of one of which a railroad company had discriminated by leasing its wharf. Both companies were independent of the railroad, and both connecting lines with it. But the court recognized the right of the railroad company and the Indian River Company to build and maintain a wharf, as incidental to their business, saying: "If either company should erect a dock or wharf for its private use, we know of no law to prohibit it." Page 492. The steamboats were competing lines, and the statutes of Florida regulating railroads provided that no common carriers subject to the provisions should "make any unjust discrimination in the receiving of freight from or the delivery of freight to any competing lines of steamboats in this State." The decision, therefore, was sustained by the laws of the State. The reasoning of the court, beyond this, seems to be in conflict with the Express Cases decided by the Supreme Court of the United States. 117 U. S. 29.

It is not clear what complainant claims from the second subdivision of section 3, besides what it claims from the first subdivision. The second subdivision is as follows: —

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper,

and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The contention of complainant is not that defendant's facilities are inadequate, but that it is excluded from them. The exclusion, however, only consists in the prevention of the landing of its boats at defendant's wharf. We have probably said enough to indicate our views of this, but we may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist.

Judgment reversed, and cause remanded for further proceedings.

LITTLE ROCK & MEMPHIS RAILROAD *v.* ST. LOUIS SOUTHWESTERN RAILWAY.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1894.

[63 *Fed.* 775.]

THAYER, Circuit Judge, delivered the opinion of the court.

It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain, & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the Interstate Commerce Law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not "subject any particular person,

company, corporation, or locality . . . to any undue or unreasonable . . . disadvantage in any respect whatever." This prohibition is very broad, it is true, but it is materially qualified and restricted by the words "undue or unreasonable." One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the Interstate Commerce Law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise. It is most probable that self-interest — the natural desire of all carriers to secure as much patronage as possible — will prevent this species of discrimination from becoming a public grievance so far as individual shippers are concerned; and it is desirable that the courts should interfere as little as possible with those business rivalries existing between railroad corporations themselves, which are not productive of any serious inconvenience to shippers. We think, therefore, that no error was committed in entering the judgment and decree in favor of the St. Louis, Iron Mountain, & Southern Railway Company.

The complaint preferred against the other companies, to wit, the St. Louis Southwestern and the Little Rock & Ft. Smith Railway Companies, is somewhat different. It consists in the alleged refusal of those companies, — first, to honor through tickets and through bills of lading issued by the complainant company, or to enter into arrangements with it for through billing or through rating; and, secondly, in the alleged refusal of these companies to accept loaded cars coming from the Little Rock & Memphis Railroad, and in their action in requiring freight to be rebilled and reloaded at the two connecting points, to wit, Brinkley and Little Rock.

Before discussing the precise issue which arises upon this record it will be well to restate one or two propositions that are supported by high authority as well as persuasive reasons, and which do not seem to be seriously controverted even by the complainant's counsel. In the first place, the interstate commerce law does not require an interstate carrier to treat all other connecting carriers in precisely the

same manner, without reference to its own interests. Some play is given by the act to self-interest. The inhibitions of the third section of the law, against giving preferences or advantages, are aimed at those which are "undue or unreasonable"; and even that clause which requires carriers "to afford all reasonable, proper, and equal facilities for the interchange of traffic" does not require that such "equal facilities" shall be afforded under dissimilar circumstances and conditions. Moreover, the direction "to afford equal facilities for an interchange of traffic" is controlled and limited by the proviso that this clause "shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier." Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 571; Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 473. In the second place, it has been held that neither by the common law nor by the interstate commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation. Little Rock & M. R. Co. *v.* East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R. 1, 16, 17; Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. Ry. Co., 41 Fed. 559, and cases there cited by Judge Caldwell. Furthermore, it has been ruled by Mr. Justice Field in the case of the Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 474, that the third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer. It should be remarked in this connection that the bills on file in the present cases, as well as the petitions in the law cases, fail to disclose whether the offending companies have refused to receive freight in the cars in which it was tendered to them, even when it would injure the freight to transfer it, or when they had no cars of their own that were immediately available to forward it to its destination. Neither do the bills or the petitions disclose whether, in tendering freight in cars to be forwarded, the complainant company demanded the payment of the usual wheelage on the cars, or tendered the use of the same free, for the purpose of forwarding the freight to its destination. The allegations of a refusal to receive freight in cars are exceedingly general, and convey no information on either of the points last mentioned.

As we have before remarked, the several propositions above stated do not seem to be seriously questioned. It is urged, however, in substance, that although the court may be powerless to make and

enforce agreements between carriers for through billing and through rating, and for the use of each other's cars, tracks, and terminal facilities, yet that when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend "equal facilities" to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce. It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier. It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public, and would only be a benefit to the complainant.

Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them, having a long line and important connections, for through billing and rating, and for the use of each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return. Or the case might be exactly the reverse. The shorter, and at the time the less important road, might be able to present sound business reasons which would make an arrangement with it, of the kind above indicated, more desirable than with the longer line. Furthermore, if it be the law that an arrangement for through billing and rating with one carrier necessitates a like arrangement with others, this might be a controlling influence in determining a railway company to refuse to enter into such an arrangement with any connecting carrier. In view of these considerations, we are unable to adopt a construction of the Interstate Commerce Act which will practically compel a car-

rier, when it enters into an arrangement with one carrier for through billing and rating and for the use of its tracks and terminals, to make the same arrangement with all other connecting carriers, if the physical facilities for an interchange of traffic are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.

In two of the cases heretofore cited (Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., and Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co.), it was held that the charge of undue or unreasonable discrimination cannot be predicated on the fact that a railroad company allows one connecting carrier to make a certain use of its tracks or terminals, which it does not concede to another. This conclusion was reached as the necessary result of the final clause of the third section of the Interstate Commerce Law, above quoted, to the effect that the second paragraph of the third section shall not be so construed as to require a carrier to give the use of its tracks or terminals to another company. Railroads are thus left by the commerce act to exercise practically as full control over their tracks and terminals with reference to other carriers as they exercised at common law. The language of Mr. Justice Field in that behalf was as follows: —

"It follows from this . . . that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated." 51 Fed. 474, 475.

Furthermore, it is the settled construction of the act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. This conclusion has been reached by all of the tribunals who have had occasion to consider the subject, and it is based on the fact that, in enacting the commerce act, Congress did not see fit to adopt that provision of the English Railway and Canal Traffic Act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made. Little Rock & M. R. Co. *v.* East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R., 1, 9, 10; Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 630, 631. See also the second annual report of the Interstate Commerce Commission (2 Interst. Commerce Com. R., 510, 511). In the

JOEST *v.* CLARENDON & ROSEDALE PACKET CO.

SUPREME COURT OF ARKANSAS, 1916.

[122 *Ark.* 353.]

HART, J. (after stating the facts). (1) It is first insisted by counsel for the defendant that he was not a common carrier. The evidence, however, shows that he was operating an incline for hire at the time the rice was lost and that he undertook to carry the cargoes of all vessels plying the river up the incline to the cars of the railroad company. This made him a common carrier. Arkadelphia Milling Co. *v.* Smoker Merchandise Company, 100 Ark. 44.

(2) The shipment in question was an interstate one. The packet company was the initial carrier. The undisputed evidence shows that the rice became worthless when it fell into the river and the initial carrier paid to the shipper the value of the rice. It had a right then to recover from the connecting carrier the amount of damage it had been required to pay the shipper by reason of the negligence of the connecting carrier. K. C. & Mfs. Ry. Co. *v.* N. Y. Central & Hudson River Rd. Co., 110 Ark. 612; Atlantic Coast Line Rd. Co. *v.* Riverside Mills, 219 U. S. 186.

(3) It was the contention of the defendant that he gave his engineer instructions not to load more than fifty sacks of rice on one car at any one time and that in disregard of these instructions the plaintiff placed 96 sacks of rice on one of the incline cars and that the overloading of the car caused the loss. On this phase of the case the court instructed the jury that if the plaintiff placed 96 sacks of rice on one of the incline cars of the defendant and that if they further found that this was in violation of the instructions of the defendant, and that the overloading of the car was the cause or one of the causes of the loss of the rice, that they should find for the defendant.

FRAZIER *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1902.

[180 *Mass.* 427.[1]]

TORT for injuries caused by the plaintiff stumbling over a wooden platform about sixteen feet square raised from four to eight inches above the concrete floor of the station of the Boston Terminal Company in Boston after the plaintiff had alighted from a train of the defendant and was passing through that station on her way to the street.

LORING, J. This case does not come within the rule that a railroad corporation, which voluntarily uses the station of another railroad as its terminal station without reserving to itself any control over it, is liable for an accident which happens to one of its passengers within the limits of the station. In this case the defendant was compelled by the legislature to "use" this union station, which is the property of another corporation, and in the control of that other corporation; it was a stockholder, and as such had a vote as to the conduct of the other corporation, but that did not make it liable for the acts of the corporation; it could appoint one of the trustees, but that does not make the acts of the corporation its acts; it could apply to the railroad commissioners to have the regulations governing the use of the station changed, but so could the mayor of the city of Boston; that did not make either one or the other liable for the negligence of the corporation. The provision that it shall "use" the station would have been significant had any option been given to the defendant railroad; but when the defendant railroad was compelled to use a union station owned and operated by a separate corporation, in the opinion of a majority of the court it was intended that it should deliver its passengers to the care of the owner of the union station, and that however it may be in case an accident occurs while the defendant's trains are being drawn by the defendant over the tracks of the Terminal Company, the defendant's liability to the plaintiff is at an end when the passenger alights in safety from its cars on to the platform of the station of the Terminal Company. The relation between the five railroad companies and the Terminal Company is virtually that between connecting railroads.

[1] Only an extract is printed. — ED.

CHAPTER IV.

EXCUSES FOR REFUSING SERVICE.

LANNING *v.* SUSSEX RAILROAD COMPANY.

ESSEX CIRCUIT, NEW JERSEY, 1877.

[1 *New Jersey Law Journal*, 21.]

THE plaintiff, a huxter, who brought up produce throughout the country, and shipped it to the Newark market, had given offence to the station agent and superintendent of the defendants' road, by personal disputes and also by reason of several suits which were pending. This led the superintendent to instruct the station agent to refuse to ship any merchandise for the plaintiff from Huntsville to Newark.

DEPUE, J., charged the jury: That the defendants were common carriers; and as such were bound to receive all merchandise offered them for shipment, unless the peculiar condition or character of the goods offered was such as to impose a hazardous undertaking; in other words, the objection to be valid must arise out of the goods and not the shipper. That the defendants under the evidence in the cause had so conducted themselves towards the plaintiff, as to give the plaintiff a right of action against them. That evidence offered by the defence of certain suits pending between the parties, numbering some eight or ten, was rejected, because it was offered for the purpose of showing a personal feeling between the parties. That the plaintiff was entitled to recover the value of the perishable goods left at the station, if he left them there believing defendants would ship them as he had directed; but if he left them there to impose a liability on defendants, and knew the goods would be lost, he could not recover them. That if plaintiff was obliged to carry his goods to another station, through the action of the defendants, he should be compensated for such additional trouble and expense. That if the plaintiff's general business was injured by the act of the defendants in refusing to ship for him from said station, he might recover for such general damage, and the damages need not be confined to the business done by the plaintiff at that particular station; the principle being, that the defendants should be held liable for all damages of which they were the immediate or proximate cause.

JENCKS *v.* COLEMAN.

CIRCUIT COURT OF THE UNITED STATES, 1835.

[2 *Sum.* 221.]

The facts, as they appeared at the trial, were substantially as follow: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat President, on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the President and Benjamin Franklin had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats, that the passengers from their boats, for Boston, should find, at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors to carry all the passengers, who wished to go, in good carriages, at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare, and make out way-bills of the passengers, for the Citizens' Coach Company. This they continued to perform. And, in order to counteract the effect of this contract, — which had been offered the Tremont line, and declined, — that line placed an agent on board the boats, to solicit passengers for their coaches; and, on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming on board their boats, and in this instance, refused to permit the plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

The cause was argued by *R. W. Greene* and *Daniel Webster* for the plaintiff, and by *Rivers* and *Whipple* for the defendants.

For the *plaintiff* it was contended, that steamboat proprietors were common-carriers, — and every person, conducting himself with propriety, had a right to be carried, unless he had forfeited that right.

The plaintiff in this instance did conduct with propriety, and had not forfeited his right to be carried by any improper misconduct.

The steamboat proprietors and Citizens' Coach Company had attempted to establish a monopoly, which should not be countenanced, it being against the public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston; while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage.

The plaintiff, in this instance, requested to be conveyed from Providence to Newport; during which passage, it was well known, no passengers were to be solicited, — that was to be done only on the passage from Newport to Providence.

For the *defendant*, it was contended, that the contract made by the steamboat proprietors and the Citizens' Company, was legal, and subserved the public convenience, and the interest of the proprietors of the boats and stages; it insured to the passengers expeditious passages

at reasonable prices, that the regulation, excluding the agents of the Tremont line of stages from the steamboats, was legal and just, because it was necessary to promote the foregoing objects, to wit: the public convenience, and the interests of the proprietors of both the boats and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

STORY, J., in summing up to the jury, after recapitulating the evidence, said: There is no doubt, that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right, but it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on

both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not.

It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to

transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But certainly they may in good faith make such contracts, to promote their own, as well as the public interests.

The only real question, then, in the present case is, whether the conduct of the steamboat proprietors has been reasonable and *bona fide*. They have entered into a contract with the Citizens' line of coaches to carry all their passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretence to say that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to ensure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff.

Webster, for the plaintiff, then requested the Court to charge: That the jury must be satisfied that this agreement was necessary or clearly expedient for the public interest, and the interest of the proprietors of the boats, or otherwise the captain of the boat could not enforce it, by refusing the plaintiff a passage; Or, that the defendant must show that the substantial interest of the proprietors, or of the public, required an arrangement, such as they had entered into, in order to justify their refusal to carry the plaintiff for the cause assigned.

The Court refused to give instruction in the manner and form as prayed; but did instruct the jury, that it is not necessary for the defendant to prove, that the contract in the case was necessary to accomplish the objects therein stated; but it is sufficient, if it was entered into by the steamboat proprietors *bona fide* and purely for the purpose of their own interest, and the accommodation of the public, from their belief of its necessity, or its utility. If the jury should be of opinion that, under all the circumstances of the case, it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regulation to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff. *Verdict for defendant.*

TURNER *v.* NORTH CAROLINA RAILROAD COMPANY.

SUPREME COURT OF NORTH CAROLINA, 1869.

[63 *N. C.* 522.]

READE, J. The Court in which the plaintiff seeks redress for an alleged injury, is a Court of the Government of one of the States of the United States. The plaintiff was engaged in a rebellion against the Government of the United States, and having for a time absented himself from the service of the Rebellion, he contracted with the defendant to convey him to the field of active operations, that he might report for such service again; and he complains that the defendant was guilty of negligence in transporting him, and that thereby he was damaged; and thereupon he asks that the Court will enforce his claim, and help him to redress.

If the Rebellion had been successful, and a government had been founded upon that success, it would doubtless have been legitimate for the courts of such government to adjust the rights of those who had been engaged as its agents in establishing the government. But will the Courts of the government which was attempted to be destroyed, interfere to redress one of the insurgents who was disabled in the very act of hostility to the government whose aid he now seeks? If the defendant, who is alleged to have committed the injury, was a friend of the United States, it would seem to be an ungenerous discrimination to subject him to damages for an act of which his government had the benefit; and if the defendant was a co-rebel with the plaintiff, and they were *in pari delicto*, the government would consult its dignity, and not interfere in their dispute.

But this must be understood to be restricted to acts clearly rebellious, or intimately connected with the Rebellion, and in aid of it; for, very clearly, the present Courts will take cognizance of all matters of a civil nature between rebels, not intimately connected with and in aid of the rebellion. In the view of the Courts of the present Government, the service in which the plaintiff was engaged was illegal. The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field, was an illegal contract, and upon the supposition that both parties were rebels, — the most favorable one for the plaintiff — there can be no recovery upon it. Martin *v.* McMillan, *ante* 468.

The objection was properly taken on the plea of the general issue. There is no error.[1]

PER CURIAM. *Judgment affirmed.*

[1] But see Gray *v.* Western Union Telegraph Co, 87 Ga. 350. — ED.

PEARSON *v.* DUANE.

SUPREME COURT OF THE UNITED STATES, 1867.

[4 *Wall.* 605.]

IN the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. Pearson ascertained that Duane had been expelled from California, and put Duane aboard the steamer Sonora. Duane filed a libel in admiralty for damages.[1]

Mr. JUSTICE DAVIS delivered the opinion of the court.

This case is interesting because of certain novel views which this court is asked to sustain.

Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.[2]

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose

[1] The statement of facts has been condensed. — ED.

[2] Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 New Hampshire, 486.

character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.[1] Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was *tendered* to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But the sum of four thousand dollars awarded as damages in this case is excessive, bearing no proportion to the injury received.[2] . . . We are of opinion that the damages should be reduced to $50.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for fifty dollars. It is further ordered that each party pay his own costs in this court. *Order accordingly.*

CHICAGO & NORTHWESTERN RAILWAY *v.* WILLIAMS.

Supreme Court of Illinois, 1870.

[55 *Ill.* 185.]

Mr. Justice Scott delivered the opinion of the court.

There is but one question of any considerable importance presented by the record in this case.

It is simply whether a railroad company, which, by our statute and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts — that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first-class car on their road. On the arrival of the train at the Rockford station the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies'

[1] Coppin *v.* Braithwaite, 8 Jurist, 875; Prendergast *v.* Compton, 8 Carrington and Payne, 462.

[2] The discussion of this point is omitted. — Ed.

car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car on appellants' train there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers travelling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the Ill. Cent. R. R. Co. *v.* Whittemore, 43 Ill. 423, that for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane, or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order, and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance the rule that set apart a car for the exclusive

use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. The State *v.* Overton, 4 Zab. 435.

In the case of the West Chester & Philadelphia R. R. Co. *v.* Miles, 55 Penn. 209, it was admitted that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations, or prejudice, but it was held not to be an unreasonable regulation to seat passengers so as to preserve order and decorum and prevent contacts and collisions arising from well-known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travellers, must be held to have no right to discriminate between passengers on account of color, race, or nativity alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation, and indignity to which the ap

pellee was exposed if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrong doer by such a verdict. But we apprehend that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation, and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

BROWN *v.* MEMPHIS & C. RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, W. TENN., 1880.

[5 *Fed.* 499.]

THIS was a common-law action for the wrongful exclusion of the plaintiff, a colored woman, from the ladies' car of the defendant's train, upon her refusal to take a seat in the smoking-car. At the time of her

exclusion the plaintiff held a first-class ticket over the defendant's road from Corinth, Mississippi, to Memphis, Tennessee, and her behavior while in the car was lady-like and inoffensive.[1]

The defendant pleaded that the plaintiff was a notorious and public courtesan, addicted to the use of profane language and offensive habits of conduct in public places; that the ladies' car was set apart exclusively for the use of genteel ladies of good character and modest deportment, from which the plaintiff was rightfully excluded because of her bad character.

HAMMOND, District Judge, charged the jury that the same principles of law were to be applied to women as men in determining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theatres, and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from travelling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.[2]

The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others travelling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men. *Verdict for the plaintiff.*

[1] Part of the statement of facts and part of the charge are omitted. — ED.

[2] See Brown *v.* R. R., 4 Fed. 37. — ED.

REGINA *v.* SPRAGUE.

SURREY QUARTER SESSIONS, ENGLAND, 1899.

[63 *Justice of the Peace*, 233.]

AT the Surry Quarter Sessions, held at Kingston-on-Thames, before Mr. George Cave, chairman, and a full bench of magistrates, Martha Jane Sprague, the wife of Sidney Sprague, was indicted for that she, being the keeper of a common inn for the reception and accommodation of travellers, called the Hautboy Hotel, at Ockham, in the county of Surrey, did, on the 27th of Oct. 1898, without sufficient cause and not regarding her duty as an innkeeper, wilfully and unlawfully neglect and refuse to supply Florence Wallace Harberton, wife of Viscount Harberton, of 108 Cromwell Road, London, then being a traveller, with victuals, which she then required, and for which she was willing to pay. The defendant pleaded "Not guilty."

Avory and Lord Coleridge addressed the jury. The Chairman, in summing up, said that an innkeeper could not refuse to supply a traveller with food and lodging without some lawful excuse. Here Mrs. Sprague did not say that she had a right to dictate to Lady Harberton what dress she was to wear. Therefore the question whether ladies should or should not wear "rational dress" was not in dispute. An innkeeper could not refuse to supply food because of the particular shape of the dress of the traveller. The only question therefore was whether there was a refusal to supply food in a decent and proper place. The innkeeper could select the room provided it was a decent and proper room. Nor, in his opinion, was a guest entitled to have a room exactly to his or her taste. The jury must judge by the requirement of ordinary and reasonable persons. The learned chairman then referred to the evidence, and asked the jury to consider whether the bar parlour was a decent and proper room for a guest to have lunch in and, further, whether the bar parlour was not to all intents and purposes part of the hotel. The jury retired to consider their verdict, and, after a short deliberation, they returned a verdict of "Not guilty."[1]

[1] See, also, Prendergast *v.* Compton, 8 C. & P. 454. — ED.

ATWATER *v.* SAWYER.

SUPREME COURT OF MAINE, 1884.

[76 *Me.* 539.[1]]

HASKELL, J. The plaintiffs applied for dinner at the defendant's inn and were refused it. For damages suffered thereby this action is brought. Soldiers in uniform came to the defendant's inn, and behaved in a disorderly manner, and threatened to turn him and his house into the street.

Defendant offered to prove that the plaintiffs were refused entertainment because they wore the same uniform, indicating that they belonged to the same band, and claimed that he could not discriminate between them and the disorderly soldiers. The evidence was excluded.

The defendant was not required by law to furnish entertainment for intoxicated or disorderly persons. If he had reason to suppose that the plaintiffs belonged to the same band of disorderly soldiers, who had threatened to despoil his house, and that they were evil disposed towards him, or had conspired with the disorderly soldiers to harm his house, or guests, or if they were intoxicated, or disorderly persons, then he would have been justified in refusing them entertainment, and the question should have been submitted to the jury; but the evidence excluded falls short of what would be a justification in the premises, and for that reason was properly excluded.

The requested instruction that the defendant was bound to provide food, sufficient for the demands of ordinary travel and no more, was rightly withheld, because the evidence does not tend to prove a compliance with that rule. It goes so far only as to show the want of food, without sufficient reason or excuse. The instructions of the presiding justice taken together hold that the evidence of lack of food is not sufficient in this case to excuse the defeudant, as surely it is not. Nor was the evidence excluded sufficient even to tend to prove a legal excuse for the want of food to furnish entertainment to the plaintiffs.

The defendant kept an inn. His failure to procure the license required by law does not relieve him from his obligation to travellers. Norcross *v.* Norcross, 53 Maine, 163.

The facts of this case do not require that the rules of law so strenuously contended for by the learned counsellors for the defendant should be applied.

[1] Only one opinion is printed; the court was unanimous in the result reached. — ED.

GODWIN *v.* CAROLINA TELEPHONE & TELEGRAPH COMPANY.

SUPREME COURT OF NORTH CAROLINA, 1904.

[48 *S. E.* 636.]

CLARK, C. J. The exception to the verification of the amendment to the answer is without merit. Since Phifer *v.* Ins. Co., 123 N. C. 410, 31 S. E. 716, the General Assembly has amended section 258 of the Code by providing (Laws 1901, p. 854, c. 610) that when a corporation is a party the verification of any pleading may be made by a "managing or local agent thereof" as well as by an officer, who alone, formerly, was authorized to make verification in such cases.

This is an application for a *mandamus* to compel the defendant to put a telephone, with necessary fixtures and appliances, in the dwelling house of the plaintiff in the town of Kinston, and admit her to all the privileges accorded to other subscribers to the telephone exchange operated by the defendant in said town. It was admitted by the plaintiff that "she is a prostitute, and keeps a bawdy house within the corporate limits of the town of Kinston, and desires to have said telephone put in said bawdy house." The court being of opinion that the plaintiff was not entitled to a *mandamus* for such purpose, the plaintiff took a nonsuit and appealed.

There was no error. A *mandamus* lies to compel a telephone company to place telephones and furnish telephonic facilities, without discrimination, for those who will pay for the same and abide the reasonable regulations of the company. This is well settled. State *v.* Nebraska Telephone Co. (Neb.), 22 N. W. 237, 52 Am. Rep. 404; 27 Am. & Eng. Enc. (2d Ed.) 1022; 19 Am. & Eng. Enc. (2d Ed.) 877; Joyce on Electric Law, § 1036, and numerous cases cited by all these. In Telegraph Co. *v.* Telephone Co., 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 893, it is said: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case cites many authorities, which are, indeed, uniform, that the telephone business, like all other services fixed with a public use, must be operated without discrimination, affording "equal rights to all, special privileges to none." Telephones "are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public," is said in Telephone Co. *v.* Telegraph Co., 66 Md. 399, at page 414, 7 Atl. 811, 59 Am. Rep. 167, which is another very instructive and well-reasoned case upon the same subject. Telephone companies are placed by our corporation act on the same footing, as to public uses, as rail-

roads and telegraphs, and the corporation commission is authorized to regulate their charges and assess their property for taxation. But while it is true there can be no discrimination where the business is lawful, no one can be compelled, or is justified, to aid in unlawful undertakings. A telegraph company should refuse to send libellous or obscene messages, or those which clearly indicate the furtherance of an illegal act or the perpetration of some crime. But recently in New York the telephone and telegraph instruments were taken out of "pool rooms" which was used for the purpose of selling bets on horse races. "Keeping a bawdy house" was an indictable offence at common law, and is still so in this state. State *v.* Calley, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704; State *v.* Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920. One who leases a house for the purpose of its being kept as a bawdy house, or with the knowledge that it will be used for that purpose is indictable. 9 A. & E. Enc. (2d Ed.) 527. A *mandamus* will never issue to compel a respondent to aid in acts which are unlawful. Wiedwald *v.* Dodson, 95 Cal. 450, 30 Pac. 580; Gruner *v.* Moore, 6 Colo. 526; Chicot County *v.* Kruse, 47 Ark. 80, 14 S. W. 469; People *v.* Hyde Park, 117 Ill. 462, 6 N. E. 33.

It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the *mandamus*. In like manner, if a common carrier knew that passage was sought by persons who are travelling for the execution of an indictable offence, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed the court will not, by its *mandamus*, require that facilities of a public nature be furnished to a house used for that business. For like reason a *mandamus* will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid a public nuisance.

The further consideration of this matter is not required on this application for a *mandamus*, but should be upon an indictment and trial of the plaintiff for the violation of law so brazenly avowed by her.

No error.[1]

[1] *Compare* Pullman P. C. Co. *v.* Bales, 80 Tex. 311, with Western Union Telegraph Co. *v.* Ferguson, 57 Ind. 495. — Ed.

PULLMAN COMPANY *v.* KRAUSS.

SUPREME COURT OF ALABAMA, 1906.

[145 *Ala.* 395.[1]]

ACTION by Max Krauss against the Pullman Company for breach of contract contained in a ticket issued by excluding him from its car.

DENSON, J. The defendant filed several pleas in answer to the complaint. Demurrers were sustained to those numbered 4, 5, and 6, respectively. The fourth plea sets up the defence that when the plaintiff presented himself at the defendant's car for passage the conductor and passengers who had bought berths and space in said car thought that the plaintiff had a "contagious and loathsome disease"; that his hands and arms were wrapped in cloth, and that there were eruptions upon a part of his body that were visible; that a number of passengers on the said car objected to plaintiff being allowed to ride thereon, and the conductor of said car would not allow him to take passage thereon because of the appearance of the said disease; and it is averred that the plaintiff did have a loathsome and contagious disease, to wit, syphilitic eczema. The fifth plea set up a rule of the defendant company against carrying persons infected with a contagious disease, and it is averred plaintiff had such a disease, to wit, syphilitic eczema. The sixth plea is in effect the same as the fourth plea, with the additional averment that at the time plaintiff purchased his ticket he did not communicate to the agent who sold him the ticket the fact that he had a contagious disease, and that the agent did not know that the plaintiff had a contagious disease.

The right of a person to a berth or passage on a sleeping car is not an unlimited right. But it is subject to such reasonable regulation as the defendant had prescribed for the due accommodation of passengers and for the safety and comfort of passengers. Sleeping car companies are not bound to admit persons as passengers on its cars who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, and, *a fortiori*, persons who are afflicted with contagious or infectious disease, so that there would be a probability of other passengers contracting the disease with which said afflicted person was suffering. As is said in Hutchinson on Carriers, with respect of common carriers: "As, therefore, the common carrier holds himself out as the carrier of only such goods as are in a fit condition to be carried, and may, as has been seen, notwithstanding his public profession, refuse to accept such as are unfit to be carried on account of their kind, the unsuitable manner in which they are prepared for transportation, or the

[1] Only a part of the opinion is printed. — ED.

insecurity or damage which they may occasion to the goods of other shippers or to the carrier himself, so the carrier of passengers, however public he may hold himself out or be engaged as such carrier, may refuse to accept persons offering themselves as passengers who are unfit to be carried, either because such person, from bad character, from being afflicted by contagious disease, from apprehended evil designs, either upon the carrier himself or his passengers, or from drunkenness or insanity, would be unfit associates for them or unsafe for the carrier." Hutchinson on Carriers (2d Ed.), § 540; Nevin *v.* Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688; Wood's Ry. Law, 1035; Putnam *v.* Railroad Co., N. Y. 108, 14 Am. Rep. 190; Paddock *v.* A. T. & S. R. R. Co. (C. C.), 37 Fed. 841, 4 L. R. A. 231.

Then in the first instance, the defendant company, if the plaintiff was afflicted with a contagious or infectious disease, loathsome in its nature, would have been justifiable in refusing to contract with plaintiff to carry him as a passenger or to furnish him a berth in its cars; or if, after receiving him as a passenger or making the contract with him to carry him, the defendant became aware that the plaintiff was afflicted with such disease, the defendant, in consideration of the duty it owed the other passengers to protect them from the misfortune of this one passenger, would have been justified in putting an end to the contract and in declining to admit or carry him as a passenger. Conolly *v.* Crescent City R. Co. (La.), 5 South. 259, 6 South. 526, 3 L. R. A. 133 Am. St. Rep. 389; Paddock *v.* A. T. & S. R. R. Co., *supra*. But the action here being in assumpsit for a breach of the contract, to perfect a rescission of the contract — a putting an end to it — the defendant must have offered the purchase price of the ticket of consideration paid by plaintiff on the agreement to carry, back to him. In this respect pleas 4, 5, and 6 were bad, having been pleaded, as they were, in bar of the entire cause of action. Hence the demurrer was properly sustained to them.[1]

[1] See McHugh *v.* Schlosser, 154 Pa. St. 480. — Ed.

ZACHERY *v.* MOBILE & OHIO RAILROAD COMPANY.

SUPREME COURT OF MISSISSIPPI, 1898.

[75 *Miss.* 746.]

WHITFIELD, J., delivered the opinion of the court.

The demurrer to the special plea should have been sustained. The former opinion of this court stated this. The blind man in this case "had, at the times referred to in the declaration, when he applied for tickets and permission to travel on defendant's cars, as much skill and ability to travel without help or attendants as any blind man could have. The declaration avers that though blind, he was otherwise qualified to travel on the railroad cars, and, in fact, had travelled for several years constantly on appellee's railroad without objection. The demurrer to this declaration was overruled, and the present demurrer to the special plea presents the same objections, and, of course, should have been sustained. It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one so sick or so crippled or so infirm as not to be able to travel without aid. And so it is not every blind person, but one who, though blind, is otherwise incompetent to travel alone on the cars. Otherwise, we would be compelled to hold that one suffering from sickness, no matter how slight, or one who had lost an arm or leg, or one, no matter how active physically, and no matter how expert a traveller, though being blind, could be shut out by such a rule. And this ought not to be, and cannot be, sound law. We are asked to hold that a regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skillful or expert a traveller he may have been, or may be, and no matter how perfectly qualified in every other respect to travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend not on a universal, arbitrary and undiscriminating rule like this one, but on the capacity to travel unaccompanied, of the particular blind person, as shown by the proof on that point in his case.

Judgment reversed, demurrer to special plea sustained and remanded.

OWENS *v.* MACON & BRUNSWICK RAILROAD COMPANY.

SUPREME COURT OF GEORGIA, 1903.

[119 *Ga.* 230.[1]]

LAMAR, J., This was a suit by one of the guards in charge of a lunatic, but it was conceded on the argument here that he could not recover if the company was justified in refusing to transport the lunatic, and we shall therefore consider what was the carrier's obligation to the insane man. The relation of carrier and passenger creates reciprocal duties. One is bound safely to transport; the other, to conform to all reasonable regulations, and so to conduct himself as not to incommode other passengers who have an equal right to a safe and comfortable passage. Those who act as to be obnoxious may be refused transportation or ejected. The payment of fare and the possession of a ticket do not require the carrier to transport those who are noisy or boisterous, or who threaten the safety of, or occasion inconvenience to, others on the train. But in the case of unfortunates who are not responsible for their disorderly conduct, and who, at best, are involuntary passengers, a different question is presented, calling in each case for the exercise of a wise discretion. On the one hand, regard must be had for the safety and comfort of other travellers, and, on the other, to the fact that in losing his mind the lunatic has not lost the right to be transported. It may be vitally important that he be taken to a place where he can receive the attention and confinement rendered necessary by his mental state. The carrier cannot absolutely refuse transportation to insane persons, but it may in all cases insist that he be properly attended, safely guarded, and securely restrained. And even where such precautions have been taken, it is not bound to afford him, if violent, transportation in the cars in which other travellers are being conveyed.[2]

[1] Only an extract from the opinion is printed. — ED.

[2] See also Atchison T. & S. F. Ry. Co. *v.* Weber, 33 Kans. 543. — ED.

NAIRIN *v.* KENTUCKY HEATING COMPANY.

COURT OF APPEALS OF KENTUCKY. 1900.

[86 *S. W.* 676.[1]]

ACTION by Robert Nairin against the Kentucky Heating Company for an injunction restraining defendant from turning off plaintiff's supply of gas. On an application for dissolution of the injunction. Application granted.

DU RELLE, J. It will be observed that the only grounds urged in the pleadings in this case for relief by injunction are, stated briefly, the facts that the defendant had natural gas which it was furnishing for heating purposes, and that plaintiff desired the gas for lighting purposes; that defendant had been restrained from furnishing gas for lighting, but that plaintiff was not a party to the proceedings; and that, while defendant was forbidden by the ordinance under which it was permitted to do business to sell gas for lighting purposes, the city which passed the ordinance was not complaining. It might be sufficient to stop here and say that here is no ground stated for relief by injunction. No contract is averred, a violation of which is sought to be prevented — no suggestion of a contract, except the averment that plaintiff applied for a gas connection and got it. There is not even an averment that he made application for a gas connection for lighting purposes. Obviously, unless the defendant be shown to be exercising a public franchise in the vending of gas for lighting purposes, there is no more ground for injunction shown here than if he had sought one to restrain Peaslee, Gaulbert & Co. from refusing to vend oil to him. But the petition on its face shows that, as to the sale of gas for lighting purposes, the defendant was not only not exercising a public franchise, but was, by the ordinance which permitted it to do business in Louisville at all, expressly forbidden to sell gas for any other than heating purposes. The plaintiff is therefore in the position of asking an injunction requiring the defendant to violate an ordinance of the city.[2]

[1] Only one point is printed. — ED.

[2] *Compare:* Decker *v.* Atchison, T. & S. F. R. R., 3 Okla. 553. — ED.

BLUTHENTHAL *v.* SOUTHERN RAILWAY COMPANY.

CIRCUIT COURT OF THE UNITED STATES, 1898.

[84 *Fed.* 920.]

APPLICATION for Mandatory Injunction.

This was a bill filed by Bluthenthal & Bickart, residents and citizens of the Northern district of Georgia, against the Southern Railway Company, a corporation of Virginia, and a resident and citizen of Virginia. Bluthenthal & Bickart were engaged in interstate commerce in the state of South Carolina and other states, and they were engaged several months prior to the filing of their bill in shipping goods consisting of whiskeys, brandies, wines, beer, and similar articles, in original packages, into South Carolina, and there selling the same through their agents. In view of the dispensary law of South Carolina, they were compelled to sell such goods in original packages in that state, and to ship the goods into the state in original packages. On September 11, 1897, Bluthenthal & Bickart were notified by the railway company that it would refuse to accept further shipments of original packages. On the day following, a shipment of original packages of liquors was tendered to the railway company, and by it refused, although freight charges were offered in advance, and Bluthenthal & Bickart agreed to sign any release which the railway company would require.

Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

PER CURIAM. This cause came on to be heard upon application for injunction *pendente lite*, was submitted upon affidavits, and argued, whereupon this court, being of opinion that the business of complainants of transporting liquors into the state of South Carolina for sale there under the lawful police regulations of that state is a legitimate business, which is entitled to be protected, and that the Southern Railway Company, as a common carrier, is required to receive and transport the goods of the complainant when tendered in such packages as will constitute reasonable and safe condition for shipment, and being of opinion, under the evidence submitted, that wines and liquors in bottles packed in wooden cases, and tendered in car-load lots, as described in the complainants' bill and amendments thereto, are in reasonable and proper condition for shipment, and that the defendant company should receive and transport the same: It is ordered that an injunction *pendente lite* issue, enjoining the defendant company from refusing to receive and transport car-load lots of the complainants' goods, packed and protected as set forth in complainants' bill, when accompanied with a waiver releasing the carrier from all waste and breakage not the result of the negligence of the defendant company or its agents.[1]

[1] See also Southern Exp. Co. *v.* Rose Co., 124 Ga. 581. — ED.

CONNORS, ADMINISTRATRIX *v.* CUNARD STEAMSHIP COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1910.

[204 *Mass.* 310.[1]]

LORING, J. The case of a person requiring medical attendance does not come within the same class as the cases (put in some of the opinions) where a very old or a very young person is alighting from a car, and for that or any other reason requires more time than a person in good health and not under a disability. Those persons and persons laboring under other difficulties are included in the class of persons fit to travel. What we have to consider in the case at bar is the case of one not fit to travel without medical attention. Had notice been given to the defendant corporation of the condition of the plaintiff's intestate when her ticket was bought for her the question of what care her physical condition was likely to demand and how and by whom it was to be provided could have been taken up with deliberation and some special arrangement made for the necessary extra care and the amount to be paid to the defendant corporation if it was arranged that the extra care was to be furnished by it.

But nothing of that kind was done in the case at bar. The ticket for the plaintiff's intestate was bought and paid for and she presented herself for embarkation as an ordinary passenger. We are of opinion that the presentation of Dr. Hare's letter was a representation by her that she needed medical attention during the voyage and looked to the defendant corporation to supply it.

If after the visit which the ship's surgeon paid to the intestate while she was lying in bed in her room the intestate had not been put ashore there would have been a serious question whether the defendant corporation had not assumed the responsibility of giving her proper medical care during the voyage on the principle acted upon by the court in deciding for the plaintiff in Croom *v.* Chicago, Milwaukee & St. Paul Railway, 52 Minn. 296.

[1] Only an extract is printed. — ED.

REASOR *v.* PADUCAH & ILLINOIS FERRY COMPANY.

COURT OF APPEALS OF KENTUCKY, 1913.

[152 *Ky.* 220.[1]]

Opinion of the Court.

A steamship company, holding itself out to the public as a carrier of passengers and freight, is a common carrier within the meaning of the statute, and the duties imposed upon common carriers, by the laws of the land, are applicable to it. The fact that it is running a special excursion does not have the effect of relieving its owners of the duty imposed upon it as a common carrier. 6 Cyc. 535; Indianapolis, etc. R. Co. *v.* Rinard, 46 Ind. 293. One of the duties, owing by a common carrier to the public, is to carry, without discrimination, as far as practicable, all persons who apply for passage and tender in payment therefor the established fares, or provide themselves with tickets entitling them to passage. But this duty to serve the public does not deprive the carrier of the right to make reasonable and proper rules for the conduct of its business, among which may be enumerated the right to deny passage to, or to exclude from its conveyance, one already a passenger, if such person is in such an intoxicated condition as to be unable to care for himself, or as to make it probable that he will annoy or disturb the other passengers; or, it may refuse passage to, or exclude from its vehicle, a person of notorious bad character, or one habitually guilty of misconduct, when it is apparent that the safety and comfort of the other passengers will be endangered by the presence of such person in the conveyance. The fact that, on a former occasion, a passenger had been guilty of misconduct, drunk, boisterous, and indecent in his behavior toward other passengers, will not justify the carrier in refusing to permit him to again travel upon its conveyance, if, when he presents himself for passage, he is sober and is conducting himself in a decent and orderly manner.

[1] An extract only from this opinion is printed. — ED.

STATE EX REL. WOOD *v.* CONSUMERS GAS TRUST CO.

SUPREME COURT OF INDIANA, 1901.

[157 *Ind.* 345.[1]]

HADLEY, J. . . . The things requested and commanded of the appellee were to lay a service-pipe from its main in Bellefontaine Street to the property line in front of the relatrix's house, and to permit her to use the gas. The mandate is not to furnish the relatrix with an adequate or any definite amount of gas, but the obvious force and limitations of the request, and order, are to require the appellee to furnish her with the necessary means, and permit her to use the gas upon the same terms that other inhabitants of the city are permitted to use it. Is it the legal duty of appellee to do these things? *Mandamus* is a proper remedy to compel appellee to furnish gas to the relatrix if it is shown that she is entitled to it. Portland, &c. Co. *v.* State *ex rel.*, 135 Ind. 54, 21 L. R. A. 639.

The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22), and licensed by the city of Indianapolis to lay pipes through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public, in whose behalf the grant is made, and the benefit received by the citizens is the adequate consideration for the right and convenience surrendered by them. The grant thus resting upon a public and reciprocal relation, imposes upon the appellee the legal obligation to serve all

[1] This case is abridged. — ED.

members of the public contributing to its asserted right, impartially, and to permit all such to use gas who have made the necessary arrangements to receive it, and apply therefor, and who pay, or offer to pay, the price, and abide the reasonable rules and regulations of the company. Portland, &c. Co. *v.* State *ex rel.*, 135 Ind. 54; Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 36 L. R. A. 535; Haugen *v.* Albina, &c. Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; People *v.* Manhattan Gas Co., 45 Barb. 136; Crumley *v.* Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058; American, &c. Co. *v.* State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; State *ex rel. v.* Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. 574.

But, without controverting the law as declared in the foregoing cases, or claiming exemption from the rule, it is answered as a justification for denying the relatrix the use of gas, that the corporation was organized as a voluntary enterprise in the general interest of the people of Indianapolis; that its purpose was not the making of money for any one, but to furnish gas to consumers in the city at the lowest possible rate, and that the supply of gas the corporation has on hand, or that it may possibly procure, is insufficient to supply what customers it has now connected with its mains, in severely cold weather, and that to permit the relatrix to use gas would be to further reduce the already insufficient supply. Will these facts relieve the appellee of its duty to permit the relatrix to use its gas? If they will, then it must be true that the relatrix is not entitled to share in the gas furnished by appellee to the inhabitants of the city, because her participation will reduce the possible supply below the full requirements of those already being served.

It is proper to observe that the present consumers of appellee's gas are not here complaining of the quantity of gas received by them, or protesting against the admission of the relatrix to a share of the supply, and it is difficult to see how the appellee, while continuing to assert and exercise its extraordinary rights, may set up its own default or probable default to others as a legal excuse for the non-performance of its duty to the relatrix.

The legal effect of the answer is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has rendered her share of the consideration. Bellefontaine Street in front of her house has been dug up and her property made servient to the use of appellee in laying its pipes, and in carrying forward its business, and her right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the streets in which appellee has laid its pipes, or it is held of right by none. The legislature alone can authorize the doing of the things

done by appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or for the benefit of any part of the public less than the whole residing within its range. Cooley's Con. Lim. (6th ed.), 651, and cases cited.

Appellee's contract is with the State, and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen similarly situated who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority, or superiority, of right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So if appellee has found it impossible to procure enough gas fully to supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed to us no special charter privilege, and under the law of its creation, certain it is, that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts, "and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are like situated, and not discriminate in favor of, nor against any." 45 Cent. L. J. 278; Haugen *v.* Albina, &c. Co., 21 Ore. 411; Olmsted *v.* Proprietors, &c., 47 N. J. L. 311; Stern *v.* Wilkesbarre Gas Co., 2 Kulp. 499; Chicago, &c. Co. *v.* People, 56 Ill. 365; 8 Am. Rep. 690; Nebraska Tel. Co. *v.* State, 55 Neb. 627, 634; Watauga Water Co. *v.* Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. 841; State *ex rel.* *v.* Delaware, &c. R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

In a further material sense the discrimination asserted by the answer becomes injurious to the relatrix. It is a matter of common knowledge that natural gas is a cheap and convenient fuel, and for many reasons is eagerly sought by those who may reasonably obtain it. It is therefore, of like knowledge, that in a community where it is supplied to some premises, and denied to others, the effect is to enhance the value of such parcels as have it, by making it more desirable and profitable to occupy them, and to depreciate the value of such parcels as are excluded from its use. It is very clear that appellee may not, under the guise of administering a public benefit, exercise a public power, to take the property of one and confer it upon another.

The principal argument of appellee's counsel is, that not having sufficient gas to supply its present customers, and having exhausted every available means for increasing its supply, it is therefore impossible for it to perform its public duty, and *mandamus* will not lie to compel an attempt to perform a duty impossible of performance. We concede in the fullest terms that *mandamus* will not lie to require an attempt to do a thing shown to be impossible. But this is not the question we have before us. The relatrix is not asking, nor the court commanding that the company attempt to increase its supply of gas. The relatrix is only seeking to be permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it. There is in the request of the relatrix nothing unreasonable, and nothing impossible of performance. The whole question comes to this. The appellee under public grant for the dispensation of a public good, has taken possession of certain streets and alleys in Indianapolis for the distribution and sale of natural gas to those abutting on its lines. The relatrix owning a lot abutting on one of the appellee's lines erected thereon a dwelling-house, and upon the faith of being permitted to use the gas has piped her house, and constructed her heating apparatus of a form, suitable only to the use of natural gas as a fuel, which will be worthless if natural gas is denied her. She has in common with other abutters been subjected to the inconvenience of having the street in front of her house dug up and had her property occupied with the company's pipes. She has made all necessary arrangements to receive the gas, has tendered appellee its usual charges, has offered to abide by its reasonable rules and regulations, and we perceive neither legal reason, nor natural justice, in denying her the rights accorded to those of her neighbors who have contributed in the same way to appellee's enterprise. The second paragraph of answer was insufficient, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the return to the alternative writ of mandate.

PEOPLE *v.* NEW YORK CENTRAL, ETC. RAILROAD CO.

SUPREME COURT OF NEW YORK, 1883.

[28 *Hun*, 543.[1]]

DAVIS, J. . . . The petition in each case alleges that the said railroad company, since about the 16th day of June, 1882, "has substantially refused to discharge its duties as a common carrier, and has, to a material degree, suspended the exercise of its franchises by refusing to take freight which has been offered at its stations in the city of New York for transportation, at the usual rates and upon the usual terms;" and that said railroad company has refused to accept and transport the greater part of the outgoing, and to deliver the incoming freight and property of the merchants doing business in the city of New York, who have relations with and need for the services of such railway, and has refused to them to furnish adequate transportation for the same, so that from that date the business community of the city of New York are unable to obtain sufficient and adequate transportation for their goods on said railroad, although they have offered the same on the usual terms and rates of transportation; but said railroad has uniformly delayed and sometimes peremptorily refused to receive and deliver freight, and to transport the outgoing freight as aforesaid, and at certain points within the State has declined to receive incoming freight, whereby great loss and damages accrue to the people of the State of New York, for which there is no adequate remedy in damages, and that the trade and commerce of said city is greatly injured by the action of the said railroad.

These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of carrier. The affidavits go far to sustain these allegations; but it is not important to examine them minutely, because the omission of a demurrer *ore tenus* extends to and admits the well-pleaded averments of the petition. Stated very briefly, the affidavits show that, for about two weeks, the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods offered for transportation from the city, and large quantities seeking transportation to the city; and in many instances refused to receive goods offered, and turned them back and closed their gates during business hours, thus causing a stoppage of all delivery of freight; that in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner; that the refusal to receive goods did not arise from any unwillingness or inability on the part of the shipper to pay charges, but was wholly the act of respondents; that it was so continuous and extensive that it seriously interfered with the

[1] This case is abridged. — ED.

business operations of the citizens of New York, deteriorated the value of many commodities, and caused a diversion of trade from the city; that great losses were caused, and especially that large quantities of perishable goods, by reason of non-delivery, were destroyed, to the value of many thousand dollars; that a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage; that large numbers of carmen were detained in their efforts to deliver freight, and the injury to that branch of business is estimated at not less than $50,000, while the aggregate of injuries is estimated at some millions. These are the substantial facts conceded by the respondents at the Special Term. Surely, it cannot be doubted that these facts, being true and unexcused, showed a strong case for the interference of the State.

The only question is, whether the course and conduct of the respondents was so far excused by anything appearing in the petition and affidavits that the court was justified in denying the motion for the writ on its merits, or in a wise exercise of its judicial discretion.

The excuse appears only in the statements of the reasons assigned by the respondents for their refusal to accept, transport, and deliver the freight and property. In the petition it is stated in these words, "that the persons in their employ handling such freight refuse to perform their work unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour, or two dollars per day of ten hours, were paid, and that their abandonment of the work, and the inefficiency of the unskilled men afterwards employed, caused the neglect and refusal complained of.

It is not alleged or shown that the workmen committed any unlawful act, and no violence, no riot, and no unlawful interference with other employees of the respondents appear. It is urged in effect that the court should regard the case as one of unlawful duress, caused by some breach of law sufficiently violent to prevent the reception and transportation of freight. There is nothing in the papers to justify this contention. According to the statements of the case, a body of laborers, acting in concert, fixed a price for their labor, and refused to work at a less price. The respondents fixed a price for the same labor, and refused to pay more. In doing this neither did an act violative of any law, or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid, and adhere to it, if they chose; but if the consequence of doing so were an inability to exercise their corporate franchises to the great injury of the public, they cannot be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes.

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held an unlawful control of their actions, and sought through them to enforce its will upon the respondents, and that the respondents, in resisting such unlawful efforts, had refused to obey unjust and illegal dictation, and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented. Whether such a state of facts could have been shown or not we cannot judicially know. The present case must stand or fall upon the papers before us; and we are not to be swerved from thus disposing of it by any suggestion of facts not in the case which might lead, if they appeared, to some other result. The most that can be found from the petition and affidavits is that the skilled freight handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for *mandamus*.

These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to *mandamus* or indictment.

We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of *mandamus* in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry, and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kind of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ on their own behalf and not for some private suitor, or to re-

dress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ all questions, whether what has been done is a sufficient compliance with its command, may properly arise and become a subject of further consideration. People *ex rel.* Green *v.* D. and C. R. R. Co., 58 N. Y. 152, 160, 161. They need not have been anticipated. It is suggested that the time has now passed when such a writ can be of any valuable effect. This is probably so, but we are governed by the record in disposing of the appeal and not by subsequently occurring events.

The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous they are entitled to have that judgment reversed, and to be indemnified, in the discretion of the court, for the costs incurred on the appeal made necessary by the error.

We think the court below had power to award the writ, and that upon the case presented it was error to refuse it.

The order should be reversed, with the usual costs, and an order entered, if deemed advisable from any existing circumstances by the attorney-general, awarding the writ.

DANIELS and BRADY, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements in each case.[1]

TOLEDO, A. A. AND N. M. RY. CO. *v.* PENNSYLVANIA CO.

CIRCUIT COURT OF THE UNITED STATES, 1893.

[54 *Fed. Rep.* 746.[2]]

IN equity. Bill by the Toledo, Ann Arbor and North Michigan Railway Company against Albert G. Blair, Jacob S. Morris, the Pennsylvania Company, the Lake Shore and Michigan Southern Railway Company, and others, to enjoin respondents from refusing to extend to complainant the same equal facilities as to others for the exchange of interstate traffic. The injunction was issued, served upon the Lake Shore and Michigan Southern Railway Company, and brought to the notice of its employees by publication. Heard on application by said company for an order attaching Clark, Case, Rutger, and Lennon, its employees, for contempt in violating the injunction. Granted as to Lennon.

RICKS, DISTRICT JUDGE. . . . This order was served upon the several defendants, and the Lake Shore and Michigan Southern Railroad, through its general superintendent, Mr. Canniff, made publication of the

[1] *Compare:* Lake Shore, &c. R. R. *v.* Bennett, 89 Ind. 457; Indianapolis, &c. R. R. *v.* Juntgen, 10 Ill. App. 295; Geismer *v.* Lake Shore &c. R. R., 102 N. Y. 563; Hall *v.* Pennsylvania R. R., 14 Phila. 414. — ED.

[2] This case is abridged. — ED.

order in such way as to bring it to the attention of its employees, and particularly to those of its engineers driving engines on the Detroit division, where the interchange of cars with the Ann Arbor road was frequent. On the 18th of March an affidavit made by the superintendent of the Michigan division of the Lake Shore and Michigan Southern Railroad was filed, alleging that certain of its employees, while in the service of said company, and with full notice and knowledge of the injunction theretofore made, had refused to obey the orders of the court, and upon that affidavit an application was made by said company for an attachment to issue against the employees so named, "as being in contempt of the restraining order of the court." The court declined to make the order in the form applied for, but directed one to be entered requiring the engineers and firemen named to appear in court forthwith, and show cause why they should not be attached for contempt. This is the usual and well-established practice in this district, as numerous precedents in the last ten years will show.

Before proceeding to pass upon the evidence as to whether the men now before the court under charges for contempt are guilty or not, it may be profitable to consider the general principles of law applicable to the duties with which the accused were charged by the orders issued to them and to their employers. They were in the employ of the defendant the Lake Shore and Michigan Southern Railroad at the time the orders in this case were made, compelling it to receive from the Ann Arbor road all interstate freight it might tender. The testimony shows that the terms of this order were made known to the employees generally, and that they were thoroughly advised of its scope and mandatory provisions. That their employer was obligated, both under the general provisions of the interstate commerce law and under this order of the court, to receive and haul all interstate freight, must have been known to them. They must also be held to have known that the penalties of the law were severe in case their employer violated either the law or the order of the court. Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed by the employees upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe

penalties. In ordinary conditions as between employer and employee, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employee has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employees of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperilled, and the safety of the property jeopardized? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them. They represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore and Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. These cars carry supplies and material, upon the delivery of which the labor of tens of thousands of mechanics is dependent. They transport the products of factories whose output must be speedily carried away to keep their employees in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of the body of its engineers and firemen, would paralyze the business of the entire country, entailing losses, and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the travelling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their own employer as to wages or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be, on some road of minor importance, who have a difference with their employer which they fail to settle by ordinary methods. If such ruin to the business of employers, and such disasters to thousands of the business public, who are helpless and innocent, is the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employees, the courts have the power to grant partial relief, at least by restraining employees from committing acts of violence or intimidation, or from enforcing rules and regulations of organizations which result in irremediable injuries to their employers and to the public. It is not necessary, for the purposes of this case, to undertake to define with greater certainty the exact relief which such

cases may properly invoke; but that the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient measures for relief essential is evident, and the courts, in the exercise of their equity jurisdiction, must meet the emergencies, as far as possible, within the limits of existing laws, until needed additional legislation can be secured.[1]

Granted as to Lennon.

PORTLAND NATURAL GAS AND OIL COMPANY *v.* STATE.

SUPREME COURT OF INDIANA, 1893.

[135 *Ind.* 54.]

FROM the Jay Circuit Court.

COFFEY, J. This was an action by the appellee against the appellant, to compel the latter by *mandamus* to supply the residence of the relator with natural gas, to be used for lights and fuel.

It appears, from the complaint, that the appellant is a corporation, duly organized under the laws of this State, for the purpose, among others, of supplying to those within its reach natural gas, to be used for lights and fuel. By permission of the common council it has laid its pipes, for that purpose, in the streets and alleys of the city of Portland, in this State, and has pipes laid in Walnut Street, of that city. The relator resides on Walnut Street, on the line of one of the appellant's main pipes. His house is properly and safely plumbed for the purpose of obtaining natural gas.

In May, 1890, the relator demanded of the appellant gas service, and tendered to it the usual and proper charges for such service, but it refused, by its officers, to furnish the gas demanded, whereupon this suit was brought to compel it to furnish the gas desired by the relator.

The court overruled a demurrer to the complaint. It also sustained a demurrer to the second, third, and fourth paragraphs of the answer filed by the appellant. Over a motion for a new trial, the court awarded a peremptory writ against the appellant, requiring it to furnish the relator with gas, as prayed in the complaint.

These several rulings are assigned as error.

Very many of the objections urged against the complaint go to the

[1] *Compare:* Trust Co. *v.* No. Pacific R. R., 60 Fed. 803; U. S. *v.* Elliot, 62 Fed. 801; *Re* Phelan, 62 Fed. 803; Arthur *v.* Oakes, 63 Fed. 310; *In re* Debs, 158 U. S. 564.—ED.

question of its uncertainty, and are technical in character. It has been so often decided that a demurrer is not the remedy for uncertainty that we need not cite authority upon the subject.

The vital question in the case relates to the right of the relator to compel the appellant, by *mandamus*, to supply his dwelling house with natural gas for lights and fuel.

There are cases which hold that in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise, among which is the case of Commonwealth *v.* Lowell Gas Light Co., 12 Allen, 75; but we think the better reason, as well as the weight of authority, is against this holding.

Mr. Beach, in his work on private corporations, volume 2, section 835, says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation, in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected."

Mr. Cook, in his work on Stock and Stockholders, section 674 (2d ed.), says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all."

To the same effect are the following adjudicated cases: State *v.* Columbus Gas, &c. Co., 34 Oh. St. 572; New Orleans, &c. Co. *v.* Louisiana Light Co., 115 U. S. 650; People, *ex rel.*, *v.* Manhattan, &c. Co., 45 Barb. 136; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; Williams *v.* Mutual Gas Co., 52 Mich. 499; *In re* Rochester Natural Gas, &c. Co. *v.* Richardson, 63 Barb. 437.

Our General Assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain, by an act approved February 20, 1889, Acts 1889, p. 22.

It has often been held that *mandamus* is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Am. and Eng. Encyc. of Law, 1284–1289; People *v.* Manhattan Gas Light Co., *supra;* Williams *v.* Mutual Gas Co., *supra;* Rochester Natural Gas, &c. Co. *v.* Richardson, *supra.*

In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of *mandamus.* As to the sufficiency of an answer averring that the company had not a sufficient supply to furnish all

those demanding gas, we intimate no opinion, as no such defence was interposed in this case.

It follows that the complaint in this case states a cause of action against the appellant, and that the court did not err in overruling the demurrer thereto.

The second paragraph of the answer avers that at the time of the demand for gas alleged in the complaint, the relator was being furnished with natural gas by the Citizens' Natural Gas and Oil Mining Company, of Portland, Indiana, and that said company has ever since continued to furnish him with gas for fuel and lights, and is ready and willing to continue doing so, so long as he may pay for the same.

The third paragraph avers that the relator has no interest in the appellant, except what he may have and hold under the laws of the State in common with all other citizens of the city of Portland, as shown by the allegations in the complaint.

The fourth paragraph avers that the demand which the relator alleges he made on the appellant to furnish him natural gas is couched in general terms merely, and is not express and distinct, and does not clearly designate the precise thing which is required, but is vague, indefinite, and uncertain, as shown by the facts alleged in the complaint.

It is contended by the appellant, in support of the second paragraph of its answer, that in view of the facts therein averred it could not comply with the demand of the relator without a violation of the provisions of an act of the General Assembly, approved March 9, 1891, Acts 1891, p. 381.

It would seem to be a sufficient answer to this contention to say that it does not appear, by any averment in this answer, that it was necessary to change, extend, or alter any service or other pipe or attachment belonging to the Citizens' Natural Gas and Oil Mining Company, in order to supply the relator with the gas he demanded. For anything appearing from this answer, the gas required by the relator from the appellant could have been furnished without interfering with that company. But if it appeared otherwise, we would not be disposed to place a construction upon that act, which would give a gas company furnishing unsatisfactory service, or charging an unsatisfactory price for its service, the perpetual right to furnish gas to a particular building because it had been permitted to attach its appliances for the purpose of furnishing gas.

In our opinion, the court did not err in sustaining a demurrer to this answer.

The third paragraph of the answer was wholly insufficient to bar the relator's cause of action. It was not necessary that he should own an interest in the appellant, different from that held by other citizens of the city of Portland. It was sufficient that the appellant owed him a duty, in common with other citizens, to furnish him gas, which duty it had refused to perform.

The fourth paragraph of the answer states no issuable fact, and is clearly bad.

The evidence in the cause tends to support the finding of the Circuit Court, and we cannot, for that reason, disturb the finding on the evidence.

There is no error in the record for which the judgment of the Circuit Court should be reversed.

Judgment affirmed.[1]

PEOPLE EX REL. POSTAL TELEGRAPH CO. *v.* HUDSON RIVER TELEPHONE CO.

SUPREME COURT, NEW YORK, 1887.

[19 *Abb. N. C.* 466.[1]]

PARKER, J. The relator is engaged in the transmission of messages by telegraph; the defendant, in the transmission of human speech by

[1] Opinion only is printed. — ED.

means of the telephone. In addition, both relator and defendant carry on a general messenger business in the city of Albany, and each are duly organized under and by virtue of statutes of this State.

By the moving papers it appears that the relator demanded of the defendant that one of its telephones be placed in the office of The Postal Telegraph Cable Company, and at the same time offered to pay any sum required for the privilege of having and using such telephone, and further promised to "comply with all the rules and regulations, regulating and controlling all persons, corporations, and companies having or using said telephone," and that the defendant refused, and still refuses, to comply with such demand.

Thereupon the relator moved the court for a peremptory *mandamus* directing the defendant, on payment to it, by relator, of its usual charges and compliance with its proper regulations, to place one of its telephones in relator's office.

The owner of a patent has the right to determine whether or not any use shall be made of his invention, and, if any, what such use shall be. When however he determines upon its use, his legal duty to the public requires that all persons shall, in respect to it, be treated alike, without injurious discrimination as to rates or conditions. A common carrier is bound to carry all articles within the line of its business, for all persons upon the terms usually imposed. Bank *v.* Adams Express Co., 1 Flippin (S. C.) 242. When a railroad company establishes commutation rates for a given locality, it has no right to refuse to sell a commutation ticket to a particular individual of such locality. Atwater *v.* Delaware, Lackawanna R. R., 4 East. Rep. 186. A gas company must furnish gas at the same rates to all consumers who apply and are ready and willing to pay therefor. Shepard *v.* Milwaukee, 6 Wis. 539; People *ex rel.* Kennedy *v.* Manhattan Gas Co., 45 Barb. 136. And a telephone company is not permitted to withhold facilities for the transaction of business from one class of citizens which it accords to others. State *ex rel.* American U. T. Co. *v.* Bell T. Co., 11 Cent. L. J. 359.

The authorities cited establish the principle that a public servant, as the defendant is, cannot so use the invention protected by the government, as to withhold from one citizen the advantages which it accords to another; and it follows that the relator in this case on compliance with the usual terms, and reasonable regulations of the defendant, is entitled to have *mandamus* issue directing the placing of one of its telephones in relator's office.

The defendant's papers contain a copy of the agreement which it requires its subscribers to sign before giving to them a telephone for use, such agreement containing the rules and regulations which the defendant has determined must form a condition precedent to the placing or using of one of its telephones.

Upon the argument, relator's counsel contended that a portion thereof was unreasonable, and that to comply therewith would sub-

stantially deprive his client from receiving any benefit to its business by the use of the telephone.

The clauses in the agreement to which objection was made were: First. "They are not to be used for . . . any part of the work of collecting, transmitting, or delivering any message in respect of which any toll has been or is to be paid to any party other than the Exchange. Second. Nor for calling messengers except from the Central Office."

As to the first: Both parties are engaged in the attempt to extend their business to the utmost possible limit. They are alike interested in securing as many customers as possible for their respective lines, and to a considerable extent they are competitors in the same territory for the business of transmitting messages.

Now, while the rule is well settled that a common carrier must serve the public impartially, still it must be borne in mind that its duty is to the public, and not to other and competing common carriers. One common carrier cannot demand, as a right, that it be permitted to use a rival common carrier's property for the benefit of its own business. Express Cases, 117 U. S. 1; Jencks *v.* Coleman, 2 Sumner, 221; Barry *v.* O. B. H. Steamboat Co., 67 N. Y. 301.

The relator in this case, however, contends that the statute, under which the defendant was incorporated, makes it the duty of the defendant to permit such use of its telephone as the relator's business requires.

The statute, among other things, provides that "it shall be the duty of the owner or the association owning any telegraph line doing business within this State, to receive despatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals, for transmitting despatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith."

It is clear that the provision quoted makes it the duty of the defendant to transmit over its wires, any and all messages which the relator may desire to have transmitted, on payment of their usual charges to individuals. It seems equally clear that it was not intended to and does not, authorize the relator to transmit its own messages over defendant's wires, on payment of the merely nominal sum required of its ordinary subscribers.

Such a rule would result unjustly to the defendant, as it would enable the relator to enter into competition with defendant in the transmission of messages over its own wires. With equal propriety it could demand that it be connected with the wires of the Western Union Telegraph Company, on payment of a proper charge, and that then it be permitted to use in its own way, and at its own convenience, the wires and property of its competitor for its business.

Such a construction as the relator contends for is not in accordance with either the letter or spirit of the statute. What the statute commands of corporations doing business in this State is, that they shall

send any message presented by another telegraph company, for that purpose, on payment of the proper and usual charges. Should defendant refuse at any time to send a message presented by the relator for that purpose, the law affords an adequate remedy for the violation of the statute. No claim is made that the defendant has ever refused to send messages for the relator, and the only question in respect to the transmission of messages in controversy here is, Can the relator demand the right to transmit them according to its own pleasure? Neither the rules established by the courts, nor the statute referred to justify such a holding, and in that respect, therefore, the rules and regulations of the defendant seem to be reasonable and proper.

The objection that so much of defendant's regulations as prevents the use of the telephone by a subscriber for the purpose of calling messengers except from the Central office, is unreasonable, seems to me to be well taken. The defendant urges that the messenger business as conducted by it is profitable, and for that reason it is desirable that it should be retained as free from competition as possible; and in aid of its position invokes the rule as established by the courts, that it owes no such duty to its rival as the permission to use its property for the purpose of a competing business, would constitute. The rule cannot be questioned, but the application is faulty. The messenger business, although carried on by the same company and at the same offices, is nevertheless a distinct and separate business, and in nowise essential to the conduct of the defendant's system of transmitting messages by telephone, for which purpose it was incorporated. To extend the rule protecting its business from rivals, so as to include any other business in which it might see fit to engage, could result in great injustice to the public. A livery stable, provision store, meat market, and other classes of business could be added in the course of time, and by amending their rules so as to include each new business in the same manner as the messenger service is now attempted to be protected, a monopoly could be created at the expense of tradesmen and merchants, and to the detriment of the public generally.

In Louisville Transfer Co. *v.* Am. Dist. Tel. Co., 24 Alb. L. J. 283-284, both parties were engaged in the carriage and coupé service, and the defendant insisted upon the right to a monopoly in the use of its own telephone methods of communicating and receiving orders for coupés. The court held otherwise, and granted an injunction restraining defendant from removing the telephone, and from refusing to transact plaintiff's business. The decision of the court in that case is applicable to the question here involved, and its reasoning is approved.

It follows: First. That the relator is entitled to a *mandamus* directing and commanding the defendant to place a telephone in its office on compliance with defendant's rules and regulations, and payment by it of defendant's proper charges.

Second. That so much of defendant's regulations as provide that the telephone shall not be used "for calling messengers except from

the Central Office," are unreasonable, and need not be acceded to by the relator.

Third. As it was stated upon the argument that a review of the decision was intended, an application for a stay under section 2,089, Code Civ. Pro., will be entertained.

CHESAPEAKE AND POTOMAC TELEPHONE CO. *v.* BALTIMORE AND OHIO TELEGRAPH CO.

COURT OF APPEALS, MARYLAND, 1887.

[66 *Maryland*, 399.[1]]

ALVEY, C. J. This was an application by the appellee, a telegraph company, to the court below for a *mandamus*, which was accordingly ordered, against the appellant, another telegraph company, but doing a general telephone business.

The appellant appears to be an auxiliary company, operating the Telephone Exchange under the patents known as the Bell patents. Those patents, formerly held by the National Bell Telephone Company, are now held by the American Bell Telephone Company, a corporation created under the law of the State of Massachusetts. The patents, with the contracts relating thereto, were assigned by the former to the latter company, prior to the 23d of May, 1882, and it is under a contract, of the date just mentioned, that the appellant acquired a right to use the patented devices in the operation of its system of telephonic exchanges.

In the agreed statement of facts, it is admitted that all the telephones used by the Chesapeake and Potomac Telephone Company (a company to which the appellant is an auxiliary organization), and also all the telephones used by the appellant in its Exchange in the City of Baltimore, and elsewhere in the State, are the property of the American Bell Telephone Company. It is alleged by the appellee and admitted by the appellant, that the offices of the Western Union Telegraph Company of Baltimore City are connected with the Telephone Exchange of the appellant, and that when a subscriber to the Telephone Exchange wishes to send a message by way of the lines of the Western Union Telegraph Company, the subscriber calls up the Telephone Exchange, and the agent there connects him with the office of the Western Union Telegraph Company, and the subscriber thereupon telephones his message over the lines of the appellant, to the Western Union Telegraph office; and a like process is repeated when a message is received by the Western Union Telegraph Company for a subscriber to the Telephone Exchange of the appellant. The appellee is a com-

[1] Part of the opinion only is given. — ED.

peting company, in the general telegraph business, with the Western Union Telegraph Company. And being such, it made application to the appellant to have a telephone instrument placed in its receiving room in Baltimore, and that the same might be connected with the Central Exchange of the appellant in that city; so that the appellee might be placed upon the same and equal footing with the Western Union Telegraph Company, in conducting its business. This request was refused, unless the connection be accepted under certain conditions and restrictions, to be specially embodied in a contract between the two companies, and which conditions and restrictions do not apply in the case of the Western Union Telegraph Company.

It appears that there were conflicting claims existing as to priority of invention, and alleged infringement of patent rights, which were involved in a controversy between the Western Union Telegraph Company and others, and the National Bell Telephone Company, to whose rights the American Bell Telephone Company succeeded; and in order to adjust those conflicting pretensions, the contract of the 10th of Nov., 1879, was entered into by the several parties concerned. The contract is very elaborate, and contains a great variety of provisions. By this agreement, with certain exceptions, the National Bell Telephone Company was to acquire and become owner of all the patents relating to telephones, or patents for the transmission of articulate speech by means of electricity. But while it was expressly stipulated (Art. 13, cl. 1) that the right to connect district or exchange systems, and the right to use telephones on all lines, should remain exclusively with the National Bell Telephone Company (subsequently the American Bell Telephone Company), and those licensed by it for the purpose, it was in terms provided that "such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news, for sale or publication, *in competition with the business* of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company. And the party of the second part [National Bell Teleph. Co.], *so far as it lawfully and properly can prevent it, will not permit* the transmission of such general business messages, market quotations, or news, for sale or publication, over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephones, or patents, for the transmission of such general business messages, market quotations, or news, for sale or publication, *in competition with such telegraph business* of the Western Union Telegraph Company, or that of the Gold and Stock Telegraph Company." The contract of the 23rd of May, 1882, under which the appellant derives its right to the use of the patented instruments, was made in subordination to the prior contract of the 10th of Nov., 1879, and contains a provision to conform to the restrictions and conditions just quoted. In that subordinate contract it is provided that "no telegraph company, unless specially permitted by the licensor, can be a subscriber, or use the system to collect and deliver messages from and to its customers," &c.

These contracts are pleaded and relied on by the appellant as affording a full justification for exacting from the appellee a condition in the contract of subscription to the Exchange, that the latter should observe the restrictions in favor of the Western Union Telegraph Company. The appellant contends that these restrictive conditions in the contracts recited are binding upon it, and that it is not at liberty to furnish to the appellant, being a telegraph company, the instruments applied for and place them in connection with the Exchange, unless it be subject to the restrictive conditions prescribed. And if this be so, the Court below was in error in ordering the mandamus to issue. But is the contention of the appellant well founded, in view of the nature of the service that it has undertaken to perform?

The appellant is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. In this case, the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and, as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within this State (which, as we have seen, includes a telephone exchange) "to receive dispatches from and for any telegraph lines, associations, or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And such being the plain duty of those owning or operating telegraph lines, or telephone lines and exchanges, within this State, they cannot be exonerated from the performance of that duty, by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the Legislature of the

State has full power to regulate and control, within reasonable limits at least, public employments and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce, and the affairs, both public and private, of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And such being the case, the owner of the property thus devoted to public use, must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of Munn *v.* Illinois, 94 U. S. 113, and which has been followed by subsequent cases. In the recent case of Hockett *v.* State, 105 Ind. 250, where the cases upon this subject are largely collected, it was held, applying the principle of Munn *v.* Illinois, that it was competent to the State to limit the price which telephone companies might charge for their patented facilities afforded to their customers. And if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.[1]

STATE EX REL. SNYDER *v.* PORTLAND NATURAL GAS AND OIL CO.

SUPREME COURT OF INDIANA, 1899.

[153 *Ind.* 483.[2]]

JORDAN, C. J. This is a proceeding in *quo warranto* by the State of Indiana on the elation of the prosecuting attorney of the twenty-sixth Judicial Circuit to dissolve and seize the corporate franchises of appellee. The venue of the cause was changed from the Jay Circuit Court to the Randolph Circuit Court, in which court a demurrer was sustained to the information for insufficiency of facts, and judgment was rendered in favor of appellee thereon. The State appeals and assigns error on the ruling of the court in sustaining the demurrer to the information.

The information alleges that the defendant is a corporation duly organized in December, 1886, under the laws of the State of Indiana relating to the incorporation of manufacturing and mining companies. The object of its organization is to conduct the business of mining oil and gas, and to furnish the same for fuel and illuminating purposes and

[1] *Compare:* Western Union *v.* Chicago R. R., 86 Ill. 246; Western Union *v.* Atlanta, &c. R. R., 5 Oh. St. 407; Union Trust *v.* Atcheson, &c. Co., 8 N. M. 327. — ED.

[2] This case is abridged. — ED.

for propelling machinery, &c. Its place of business or operation is stated to be at the city of Portland, in the State of Indiana. After its incorporation it obtained from said city permission to lay gas pipes along and under the public streets of that city for the purpose of supplying its inhabitants with gas for light and fuel, and it engaged in furnishing gas to them for such purposes. That the Citizens Natural Gas and Oil Company was also duly incorporated in February, 1889, under the same laws and for the same purposes as was defendant, and it also was granted the privilege by the city of Portland to lay its pipes in and along the streets of the city for the same purposes as was defendant, and it engaged in supplying gas to the inhabitants of said city for fuel and light.

After alleging these facts, the information charges that the defendant, on the 1st day of September, 1891, "in violation of law and in the abuse of its corporate powers and in the exercise of privileges not conferred upon it by law" entered into a certain agreement or combination with said Citizens Gas and Oil Mining Company "to fix the rate of gas to be charged by them and each of them to the consumers in said city of Portland." It was further agreed by and between the defendant and said other mentioned company that "neither of said companies should or would attach the service pipes of any gas consumer in said city to its pipe lines if, at the time, such customer or consumer was a patron of the other company."

It is further averred that the defendant has observed and complied with said agreement, and the price of gas has been fixed thereby, and it has at all times refused to sell or furnish gas to the inhabitants of said city at any other price than the one fixed by said agreement, and, in pursuance of said agreement and in order to prevent competition, it has refused, and still refuses, to supply divers inhabitants of the said city of Portland with gas who, as it is alleged, were consumers of gas from the pipe line of the said Citizens Gas and Oil Mining Company. It is further alleged that there is no other corporation, company, or person in said city engaged in supplying gas for light and fuel to its inhabitants.

The information is not a model pleading, and may perhaps be said to be open to the objection that in some respects it is uncertain, and in others states conclusions instead of facts. The question, however, presented for our decision is: Are the facts, as therein alleged, sufficient to entitle the State to demand that the appellee's corporate franchises shall be declared forfeited?

Appellee is in its nature a public corporation, which fact has been recognized by our legislature in conferring upon companies engaged in a business of like character the right of eminent domain. Acts 1889, p. 22, § 5103, Burns, 1894. Being the creature of the law, the franchises granted to it by the State, in theory at least, were granted as a public benefit, and in accepting its rights, under the laws of the State, it impliedly agreed to carry out the purpose or object of its creation, and

assumed obligations to the public; and such obligations it is required to discharge. Beach on Monopolies and Industrial Trusts, § 221; Thomas *v.* Railroad Co., 101 U. S. 71.

It certainly can be said, and the proposition is sustained by ample authority, that, in furtherance of the purposes for which it was created, it owed a duty to the public. Its duty towards the citizens of the city of Portland and their duty towards it may be said to be somewhat reciprocal, and any dealings, rules, or regulations between it and them, which do not secure the just rights of both parties, cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it and complied with the company's reasonable regulations and conditions. Portland Natural Gas, &c. Co. *v.* State, 135 Ind. 54, and authorities there cited; People *v.* Chicago Gas Trust Co., 130 Ill. 268; Chicago, &c. Co. *v.* People's, &c. Co., 121 Ill. 530; Westfield Gas, &c. Co. *v.* Mendenhall, 142 Ind. 538; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1; Central Union Tel. Co. *v.* Falley, 118 Ind. 194; Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341; 8 Am. and Eng. Ency. of Law, 614.

It is an old and familiar maxim that "Competition is the life of trade," and whatever act destroys competition, or even relaxes it, upon those who sustain relations to the public, is regarded by the law as injurious to public interests and is therefore deemed to be unlawful, on the grounds of public policy. Greenhood on Public Policy, pp. 654, 655; Chicago, &c. Co. *v.* People's, &c. Co., *supra;* Gibbs *v.* Consolidated, &c. Co., 130 U. S. 396; Hooker *v.* Vandewater, 4 Denio, 349; Consumers Oil Co. *v.* Nunnemaker, 142 Ind. 560; Beach on Pr. Corp. §§ 54, 55.

The authorities affirm, as a general rule, that, if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public; it is sufficient to know that the inevitable tendency of the act is injurious to the public. Central Ohio, &c. Co. *v.* Guthrie, 35 Ohio St. 666; Swan *v.* Chorpenning, 20 Cal. 182; State *v.* Standard Oil Co., 49 Ohio St. 137; Gibbs *v.* Smith, 115 Mass. 592; Richardson *v.* Buhl, 77 Mich. 632; Pacific Factor Co. *v.* Adler, 90 Cal. 110; Beach on Monopolies and Industrial Trusts, § 82.

Recognizing and adopting the principles to which we have referred as sound law, we next proceed to apply them as a test to the facts involved in this case. It will not be unreasonable to presume that one of the objects upon the part of the city of Portland in granting permission to the Citizens Gas Company to lay its pipes and mains along and under the streets of that city, after it had awarded the same rights to appellee,

was that there might be a reasonable and fair competition between these two companies. By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other.

That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between the two companies certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement appellee disabled, or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests.

From what we have said it follows that the court erred in sustaining appellee's demurrer to the information, and the judgment is therefore reversed and the cause remanded with instructions to the trial court for further proceedings consistent with this opinion.[1]

CHICAGO, M. & ST. P. R. R. *v.* WABASH, ST. L. & P. R. R.

CIRCUIT COURT OF UNITED STATES, 1894.

[61 *Fed.* 993.[2]]

CALDWELL, J. The design of the contract on which the appellant rests its claim is not left to presumption or conjecture. Its purpose is apparent on the face of the instrument. Its object was not to avoid ruinous competition by entering into an agreement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates. By the means of the contract, all of the roads are to be operated, as to through traffic, "as they should be if operated by one corporation which owned all of them." These seven corporations were made one company so far as concerned their relations with each other, with rival carriers, and with the public. Between them there could be no competition or freedom of action. To the extent of the traffic covered by this contract, — and it covered no inconsiderable portion of the traffic of the continent, — each company practically abdicated its functions as a common carrier, and conferred

[1] *Compare:* Gibbs *v.* Gas Co., 130 U. S. 396; Trust Co. *v.* Columbus, &c. R. R., 95 Fed. 22; Light Co. *v.* Sims, 104 Cal. 331; People *v.* Gas Trust, 130 Ill. 293; Light Co. *v.* Claffy, 151 N. Y. 42. — ED.

[2] Only opinion is printed. — ED.

them on a new creation, for the sole purpose of suppressing competition. Before they entered into this contract, each of these companies had the power, and it was its duty, to make rates for itself, and to make them reasonable; but, by the terms of this contract, every one of the companies was divested of all its powers and discretion in this respect. The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.

A railroad company is a *quasi* public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy, and void. Railroad Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159; Gulf, C. & S. F. R. Co. *v.* State (Tex. Sup.), 10 S. W. 81; State *v.* Standard Oil Co. (Ohio Sup.), 30 N. E. 279; Texas & P. Ry. Co. *v.* Southern Pac. Ry. Co. (La.), 6 South. 888; Gibbs *v.* Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Salt Co. *v.* Guthrie, 35 Ohio St. 666; Stanton *v.* Allen, 5 Denio, 434; Hooker *v.* Vandewater, 4 Denio, 349; Chicago Gaslight & Coke Co. *v.* People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600; W. U. Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160; Sayre *v.* Association, 1 Duv. 143; U. S. *v.* Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 58.

But, conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract.

The contract contemplated two modes of pooling, — one by an actual division of the traffic, and the other by a division of the gross earnings. The traffic not having been divided, this is a suit to enforce the second method of the pool, — a division of the gross earnings; or, in

other words, a pooling of the earnings. The illegal and void contract has not been executed, and the appellant invokes the aid of the court to compel the Wabash Company to execute it on its part by pooling its earnings. It may be conceded that the illegal contract has been performed on the part of the appellant, though it does not appear to have done anything more than to sign the contract. The only thing it could do towards a performance of the contract was not to compete for the business. This was a violation of its duty to the public, and illegal. But a contract performed on one side only is not an executed contract. Where an illegal act is to be done and paid for, the contract is not executed until the act is done and paid for. A court will not compel the act to be done, even though it has been paid for. Neither will it compel payment, although the act has been done; for this would be to enforce the illegal contract. The illegality taints the entire contract, and neither of the parties to it can successfully make it the foundation of an action in a court of justice. The Wabash Company performed the service that earned the money the appellant is seeking to recover. The appellant earned no part of it. There is nothing in the record to show that the appellant would have carried more or the Wabash Company less freight if the contract had never been entered into. The money demanded was received by the Wabash Company for freight tendered to it by shippers themselves, and carried by it over its own line. It was legally bound to accept the freight thus tendered, and was entitled to receive the compensation for the carriage, and cannot be compelled to pay the money thus earned, or any part of it, to the appellant on this illegal and void contract.

The case of Brooks *v.* Martin, 2 Wall. 70, is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defence against a demand that existed independently of the contract; whereas, in this case, the illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478; Gibbs *v.* Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Texas & P. Ry. Co. *v.* Southern Pac. Ry. Co., 41 La. Ann. 970, 6 South. 888; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Hooker *v.* Vandewater, 4 Denio, 349. We have not overlooked the case of Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. 306. The opinion in that case is not supported by the authorities, and is unsound in principle.

The decree of the court below is affirmed.[1]

[1] *Compare:* U. S. *v.* Freight Ass., 166 U. S. 290; U. S. *v.* Joint Traffic Assn., 171 U. S. 505; Anderson *v.* Jett, 89 Ky. 375; R. R. *v.* R. R., 41 La. Ann. 940; R. R. *v.* R. R., 66 N. H. 100; Leslie *v.* Lorillard, 110 N. Y. 519; Cleveland R. R. *v.* Clesser, 126 Ind. 362. — Ed.

UNITED STATES *v.* AMERICAN WATER WORKS COMPANY.

CIRCUIT COURT OF NEBRASKA, 1889.

[37 *Fed.* 747.[1]]

THE United States as owner of Fort Omaha reservation, a tract of many acres on which were dwellings, hospitals, barracks and stables, brought this bill to get all the water used by the reservation metered through a single meter to be paid for at the relatively lower rates for large consumption fixed in the section of the water ordinance.

BREWER, J. Obviously the whole scope of this section is to give to the water company a right to treat each building separately. That, by the agreed statement of facts, has been their constant practice, and any other construction would work injustice to it. The very fact that all the special rates prescribed make no reference to ownership of buildings or property, shows that the question of ownership is immaterial, and that the rates depend upon the character of the property, and the probable extent of the use. Take the first two items: it is not to the owner of the dwelling-house not exceeding five rooms, but for the house itself, and for each additional room. The same principle should apply to a large property like the reservation, upon which are many buildings. The question is not who owns all this, but what is the character of the buildings, the number of them, and the uses to which they are put. And the meter rates are to be construed as merely a substitute for the special rates, giving the right to pay for the amount of water, rather than upon the character and size of the building. Suppose some one in the city owning a block of ground should put up 20 or 30 residences to rent; it would be a clear violation of the spirit of this ordinance to permit him to supply all these houses as though they constituted one property. Indeed, as nothing is said about contiguity, if ownership was the test, a man having buildings, residences, stores, and factories scattered in different parts of the city might insist upon a supply to all at the lowest rate; or, as neither ownership nor contiguity is spoken of, why might he not contract for all the water from defendant, and subcontract it to various consumers in the city? I think there can be little doubt on this. The practice which has obtained ever since defendant's water-works were established correctly interprets the ordinance, and expresses its true spirit and meaning; and that gives defendant the right to treat each building as a separate consumer, and charge either for the building or at meter rates accordingly. This being the true interpretation of the contract, it follows that complainant's case must fail, and a decree must go dismissing the bill.

[1] The statement and the opinion are abridged and condensed. — ED.

MICHIGAN CENTRAL RAILROAD COMPANY *v.* PERE MARQUETTE RAILROAD COMPANY.

SUPREME COURT OF MICHIGAN, 1901.

[128 *Mich.* 333.[1]]

BILL by the Michigan Central Railroad Company to enjoin the Pere Marquette Railroad Company from violating the traffic provisions of a contract for the joint use of premises. From a decree dismissing the bill, complainant appeals. Reversed.

3. It is next urged that, under the complainant's construction of the contract, it is void as against public policy, in that it illegally restricts the Saginaw Valley & St. Louis Railroad Company from receiving and shipping freight. It would seem a sufficient reply to this to say that there is no restriction by the contract to carry freight over its own road. Its entrance into Saginaw from the junction with the Jackson, Lansing & Saginaw Railroad was one purely of contract. Its own road was in fact constructed only to the junction. It then had two ways open to it, — either to construct its own independent road into Saginaw, or make a contract with the Jackson, Lansing & Saginaw Railroad Company. It chose the latter. The contract which it made must either stand or fall as a whole. Alford *v.* Railway Co., 3 Interst. Com. R. 519. If the objectionable provisions are absolutely void, then the contract must utterly fail. Without these provisions the Jackson, Lansing & Saginaw Railroad Company would undoubtedly never have made the contract. This court cannot make one for it. If the contract is entirely void for this reason, complainant, as stated by its counsel, has no objection to such a decree; for this would leave the defendant without any right whatever over the complainant's road.

It is conceded that a railroad company cannot enter into a contract to incapacitate itself from discharging the duties resting upon it. This, however, is far from holding that railroad companies may not enter into such an arrangement as was made in this case. There is not a word in the contract which limits the duty of either of the three roads to receive freight for transportation, or which restricts the right of any shipper to have his freight carried by either road. The Saginaw Valley & St. Louis Railroad Company expressly retained the right to ship eastward if it should construct its road in that direction. It had no connection east of Saginaw, and none was provided by its charter. The restriction in regard to picking up freight for the East was aimed solely at the Flint & Pere Marquette road, which was then in existence, and had a line running eastward from East Saginaw. It was the only competing line then in existence. The contract was aimed at it and nothing else.

[1] Only the principal point is printed. — ED.

No public policy and no statute were attacked by this provision. The Flint & Pere Marquette had its own road and station grounds in Saginaw. Any citizen of Saginaw could ship freight from or receive freight at its depot. The same facilities were offered by the Jackson, Lansing & Saginaw Railroad Company. The public had two competing lines, and could at its choice deal with either. That right was not interfered with by this contract. The Saginaw Valley & St. Louis Railroad Company, by the contract was permitted to run its cars to the junction of the Flint & Pere Marquette Railway at the Y north of the city. This was for the accommodation of the former company. It is now claimed that the present defendant, which has bought the Flint & Pere Marquette and other roads, obtained the very right which the Saginaw Valley & St. Louis Railroad Company contracted not to exercise, and which it did not exercise for a period of 22 years. We think this claim cannot be maintained. The Jackson, Lansing & Saginaw Railroad Company had the right to stipulate that the other road should not use its depots and grounds to pick up and deliver freight to its only competitor, the Flint & Pere Marquette Railway Company, and in doing so violated no rule of public policy or statute of this state. Contracts between railroads, more restrictive than this one, have been sustained. Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564 (16 Sup. Ct. 1173); Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596 (12 Sup. Ct. 479). As was said in Leslie *v.* Lorillard, 110 N. Y. 519 (18 N. E. 363, 1 L. R. A. 456): "The apprehension of danger to the public interests should rest on evident grounds, and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the welfare of the public."

BILLINGS MUTUAL TELEPHONE COMPANY *v.* ROCKY MOUNTAIN BELL TELEPHONE COMPANY.

CIRCUIT COURT OF THE UNITED STATES, 1907.

[155 *Fed.* 207.[1]]

THE right to be acquired must be regarded in its relation to the character of the thing used, and, while rights of property should always be scrupulously protected, by strict construction of laws conferring power of appropriation of the property of a person for public use, no construction of a substantial privilege should be adopted which, in its practical effect, would deny the benefit expressly and clearly intended. I think that the use that may be acquired by the plaintiff company is such as is practicable by a connection like that had in the every day service with defendant's own connections. This is feasible by a plan of trunking between the exchanges, where the respective switch or toll

[1] The earlier part of the opinion dealing with the statutes is omitted. — ED.

boards are maintained. The defendant company would then receive the business from the plaintiff as it now receives business coming from one of its own subscribers. Electricians of experience say that it is neither against scientific rules, nor uncommon, in practical telephony, to find one telephone plant connected with toll lines of other systems; that the matter of current is practically the same in talking on all systems; and that, if the established circuits cannot do the business, the method of taking care of increased business or an overload is by stringing more circuits. The operators of defendant company would have to be made use of to make such service practical; the additional service that the defendant's operators would have to perform being that of "plugging in," answering, and getting the connection. But, in effect, the same process is required to be used for a patron of the defendant company's exchange, so that the question is really resolved into one of detail, and is not one of practicability. It may even be that, owing to possible differences in the switchboards of the two companies, an auxiliary apparatus will be necessary; but that is also a matter of mechanical adjustment, not unusual or at all difficult of arrangement.

The right to use is the thing the law has said may be acquired. Therefore, where appropriate proceedings are instituted, as in this case, it is this right of use that is to be acquired; and the reasonable, practical method by which the right may be enjoyed is use by a connection made so that the one company, by its operators, may call the operators of the other company, which must receive the long-distance business of the subscribers of the plaintiff company and care for the same very much as it would like business of its own patrons. In other words, where two companies owning different lines of telephones in Montana cannot agree upon the compensation for the privilege of connection and use, the law of Montana obliges the one to submit to connection with the other, and (upon payment of damages to be assessed), to accept a patronage, and to submit to a necessary use that it might not wish to accept or allow, and probably could not be compelled to accept or allow, were it not for the provisions of the Constitution and laws of the state.

It would be too narrow a view of the constitutional provision and the law to say that right of connection and use is satisfied by mere physical union of the telephone wires and mere adjustment of the same. Right of connection and use means the privilege of having the business proffered accepted and efficiently cared for by the receiving company, through its agents or operators, substantially as would be the business proffered by one of its own subscribers.

No questions of complicated traffic arrangements enter into the consideration of the matter as it now stands before the court. Difficulties of such a nature may arise hereafter, but they can be surmounted when the principle is recognized that the spirit of the Constitution and the letter of the laws of the state, in which defendant operates its lines,

compel it, under its primal duty to the public, to yield to the right of plaintiff company to connect its line with defendant's, and to enjoy the use thereof in a reasonable and effective way, provided, of course, damages are paid, as required by law. Atlantic Coast Line R. Co. *v.* N. C. Corporation Commission (June 1, 1907), 27 Sup. Ct. 585, 51 L. Ed. 933; Campbellsville Tel. Co. *v.* Lebanon L. & L. Tel. Co., 80 S. W. 1114, 84 S. W. 518, 118 Ky. 279.

From these views it follows that plaintiff is within its rights when it invokes the power of eminent domain for proposed long-distance telephone connections, which constitute a clearly defined public use. The use sought is convenient and of great benefit to the public. There will be no taking in the sense of exclusion of defendant company from enjoyment or control of its property; but rather a limited use such as a company operating a telephone system offers to and necessarily surrenders to a patron when its lines are being used for conversation.

Defendant, having erected its system subject to reasonable impositions that might be put upon it by the Constitution and laws of the state, is under a duty to allow such a connection and use as is outlined above.

The motion is granted.

JOHNSON *v.* DOMINION EXPRESS COMPANY.

HIGH COURT OF JUSTICE, ONTARIO, 1896.

[208 *Ontario*, 203.[1]]

THIS was an action brought by William Johnson and others trading under the name of the National Package Dispatch Company, to compel the defendants to carry goods tendered to them for transportation, under the circumstances set out in the judgment. [It appeared that plaintiffs were engaged in gathering together small packages from shippers charging lower rates than the plaintiffs for small packages, and packing them into 100 lb. packages for which they demanded the 100 lb. rate for large packages.]

ROSE, J. It seems to me that the question comes simply down to this, did the defendant company hold itself out as a carrier to carry goods for persons in the position of the plaintiffs, and for the purposes for which the plaintiffs desired them to be carried; and, secondly, if it did: does the tariff rate or rates charged to others, on the evidence before me, establish that the amount tendered by the plaintiffs, was a reasonable amount, or that the defendant company might not well charge for each parcel in a packed parcel according to its ordinary

[1] Only the conclusion of the judge is printed. — ED.

rates? I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right absolutely to decline to carry parcels so packed for the plaintiffs, but I say I do not think the defendant even intended to hold itself out to the public as the carrier of the goods of a rival express company, making use of its capital and its facilities for doing business to the aggrandizement of its rival and its own destruction. An argument which would lead to the conclusion that Mr. McCarthy candidly, but boldly, avowed on behalf of his clients, seems to me so unjust as to show that it is not logically sound. In my opinion the action should be dismissed.

CENTRAL ELEVATOR COMPANY ET AL. *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1898.

[174 *Ill.* 203.[1]]

INFORMATIONS filed by the Attorney General praying an injunction to restrain the defendants, as warehousemen, from storing grain in their own warehouses in contravention of their public duty.

MR. JUSTICE CARTWRIGHT. It is a firmly established rule that where one person occupies a relation in which he owes a duty to another he shall not place himself in any position which will expose him to the temptation of acting contrary to that duty or bring his interest in conflict with his duty. This rule applies to every person who stands in such a situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to which, alone, it will be applied. They have applied it to agents, partners, guardians, executors, administrators, directors and managing officers of corporations, as well as to trustees, but have never fixed or defined its limits. The rule is founded upon the plain consideration that the one charged with duty shall act with regard to the discharge of that duty, and he will not be permitted to expose himself to temptation or be brought into a situation where his personal interests conflict with his duty. Courts of equity have never allowed a person occupying such a relation to undertake the service of two whose interests are in conflict, and then endeavor to see that he does not violate his duty, but forbid such a course of dealing irrespective of his good faith or bad faith. If the duty of the defendants, as public warehousemen, stands in opposition to personal interest as buyers and dealers in grain storing the same in their own warehouses, then the law interposes a preventive check against any temptation to act from personal interest by prohibiting them from occupying any such position.

[1] Only the general argument of the court is here reprinted. — ED.

The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty toward the public. The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers by exacting from them the established rate for storage while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is, that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. The grades established for different qualities of grain are such that the grain is not exactly of the same quality in each grade, and the difference in market price in different qualities of the same grade varies from two cents per bushel in the better grades to fifteen cents in the lower grades. The great bulk of grain is brought by rail and in car-loads and is inspected on the tracks, and the duty of the warehousemen is to mix the car-loads of grain as they come. Such indiscriminate mixing gives an average quality of grain to all holders of warehouse receipts. Where the warehouseman is a buyer the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel and immediately re-sell the same to a private buyer at a quarter of a cent less than they paid, exacting storage which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder of the grain of the different proprietors if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed he cannot be permitted to use the advantage of his position to crush out competition and to combine in establishing a monopoly by which a great accumulation of grain is in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course. The defendants are large dealers in futures on the Chicago Board of Trade, and together hold an enormous supply of grain ready to aid their opportunities as speculators. The warehouseman issues his own warehouse receipt to himself. As public warehouseman he gives a receipt to himself as individual, and is enabled to use his own receipts for the purpose of trade and to build up a monopoly and destroy competition. That this course of dealing is inconsistent with the full and impartial performance of his duty to the public seems clear. The defendants answered that the practice had a beneficial effect upon

producers and shippers, and naturally were able to prove that when, by reason of their advantages, they were overbidding other dealers there was a benefit to sellers, but there was an entire failure to show that in the general average there was any public good to producers or shippers.

Decree affirmed.

UNITED STATES EX REL *v.* DELAWARE & HUDSON RAILROAD COMPANY ET AL.

SUPREME COURT OF THE UNITED STATES, 1909.

[29 *Sup. Ct.* 527.[1]]

SIX writs of error to the Circuit Court of the United States for the Eastern District of Pennsylvania to review judgments denying *mandamus* to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite regions. Reversed and remanded for further proceedings. Also six appeals from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dismissing bills in equity seeking to accomplish the same result by injunction. Reversed and remanded for further proceedings.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other states as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate commerce act," and of the said amendment thereto known as the "commodities clause."

Mr. Justice WHITE delivered the opinion of the court: We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported, in whole or in part;

[1] Only the conclusions are printed. — ED.

(c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent; and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. Case, to which we have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited, on the one hand, and inordinately extended, on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated. Armor Packing Co. *v.* United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.[1]

[1] Compare New York, N. H. & H. R. R. Co. *v.* Interstate Com. Com., 200 U. S. 361. — Ed.

CHAPTER V.

PROVISION OF ADEQUATE FACILITIES.

FELL *v.* KNIGHT.

EXCHEQUER, 1841.

[8 *M. & W.* 269.]

[CASE. The declaration stated that the defendant did keep a certain common inn for the reception of travellers, that the defendant had sufficient room and accommodation for the plaintiff, that the plaintiff was ready and willing to pay therefor; nevertheless that the defendant not regarding his duty as such innkeeper, denied the plaintiff accommodation, etc.

Plea. That the defendant offered to the plaintiff to allow him to sleep in any one of certain bedrooms; but the plaintiff refused to sleep in any of said bedrooms, but requested that candles might be brought him in order that he might sit up all night in another upstairs room in said inn, which the defendant then reasonably refused.]

Lord ABINGER, C. B. I am of opinion that the plea is sufficient. I do not think a landlord is bound to provide for his guest the precise room the latter may select. Where the guest expresses a desire of sitting up all night, is the landlord bound to supply him with candle-light in a bedroom, provided he offers him another proper room for the purpose? The plea shows, that the landlord did everything that was reasonable. The short question is, is a landlord bound to comply with the caprice of his guests, or is he justified in saying, You shall not stay in a room in this way, and under these circumstances? I think he is not bound to do so. All that the law requires of him is, to find for his guests reasonable and proper accommodation; if he does that, he does all that is requisite. I am also inclined to think, notwithstanding the case which has been cited of Rex *v.* Jones, that the declaration is bad for want of an allegation of a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was ready to pay; he should state further that he was willing and offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows, so that no tender can be made; but I rather think those facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment of my Brother Coleridge, in the case cited: but it is not necessary to decide that point in the present case. This rule must be discharged.

ALDERSON, B., and ROLFE, B., concurred. *Rule discharged.*

DOYLE *v.* WALKER.

QUEEN'S BENCH, UPPER CANADA, 1867.

[29 *Upp. Can. Q. B.* 502.]

DRAPER, C. J., delivered the judgment of the Court. The plaintiff neither asserts nor proves any special contract. He rests his case upon what he assumes to be his right resulting from his being a guest in an inn, and the defendant being the innkeeper. He assumes that having been let into possession of a room, he has acquired such an exclusive right of possession as against his landlord, so long as he continues to occupy it, that the latter is liable as a trespasser for entering and removing his trunks out of it. We do not so understand the law. The contention appears to us to be inconsistent with the well settled duties, liabilities, and rights of the innkeeper. Whatever may be the traveller's rights to be received as a guest and to be reasonably entertained and accommodated, the landlord has, in our opinion, the sole right to select the apartment for the guest, and, if he finds it expedient, to change the apartment and assign the guest another, without becoming a trespasser in making the change. If, having the necessary convenience, he refuses to afford reasonable accommodation he is liable to an action, but not of trespass. There is no implied contract that a guest to whom a particular apartment has been assigned shall retain that particular apartment so long as he chooses to pay for it. We think the contention on the plaintiff's part involves a confusion between the character and position of an innkeeper and a lodging housekeeper.

It appears to us further, that although the innkeeper is bound to receive, the guest must not only be ready and willing, and before he can insist as of right to be received that he must offer, to pay whatever is the reasonable charge; and that a guest who has been received loses the right to be entertained if he neglects or refuses to pay upon reasonable demand. The plaintiff's bill accrued due *de die in diem*, and had been in arrear though frequently demanded. On both points, we think, upon the evidence the plaintiff failed, and that there should be a new trial without costs.

BROWNE *v.* BRANDT.

KING'S BENCH DIVISION, ENGLAND, 1902.

[1902, 1 *K. B.* 696.[1]]

LORD ALVERSTONE, C. J. The plaintiff in this case contends that the defendant has broken his common law duty as an innkeeper to provide accommodation for travellers, and that this action can be maintained if the defendant had a room at the inn in which the plaintiff could have passed the night. The county court judge has found that the defendant's house was full as regarded proper sleeping accommodation; that there was no empty bedroom; that there were two rooms available for the accommodation of the plaintiff, and that that accommodation was refused. I do not think the question whether the plaintiff demanded to take the one sitting-room was submitted to the county court judge, but I do not wish to decide this case on narrow grounds; we must assume that there was some place in the house where the defendant might have permitted the plaintiff to stay for the night. I think that we should be straining the common law liability of an innkeeper if we were to hold that the plaintiff has a good cause of action. The true view is, in my opinion, that an innkeeper may not pick and choose his guests; he must give the accommodation he has to persons who come to the inn as travellers for rest and refreshment. I cannot think that the authorities to which we have been referred shew that where an inukeeper provides a certain number of bedrooms and sitting-rooms for the accommodation of guests he is under a legal obligation to receive and shelter as many people as can be put into the rooms without overcrowding. I think a person who comes to the inn has no legal right to demand to pass the night in a public sitting-room if the bedrooms are all full, and I think that the landlord has no obligation to receive him. The landlord must act reasonably; he must not captiously or unreasonably refuse to receive persons when he has proper accommodation for them. Here the county court judge has found, in effect, that the defendant did act reasonably. For these reasons I am of opinion that the appeal must fail.

[1] Only the opinion of Lord Alverstone, C. J., is printed. The other justices concurred. — ED.

GARDNER *v.* PROVIDENCE TELEPHONE CO.

SUPREME COURT OF RHODE ISLAND, 1901.

[50 *Atl. Rep.* 1014.]

PER CURIAM. The evidence shows, as stated by the complainant, that the defendant refuses to furnish a long-distance extension set in connection with a grounded telephone circuit. The evidence does not convince a majority of the court that such a combination can be made generally without impairment of the service. The uniform practice of the company is against this contention. The company offers to annex to the complainant's grounded circuit, for a reasonable price, such an extension set as is appropriate for the circuit, and which it contends will give satisfactory service. This is all that the complainant can demand. He is in default in not requesting the company to provide what it says it is willing to give him, and in insisting on the exact form of apparatus which he has installed. It is for the company, not for the subscriber, to determine the type of apparatus it shall use, and there is no evidence that the type it offers is inadequate. These points were fully considered by the court upon the former hearing, as a careful examination of the opinion will show. It may further be observed that in this case there is no evidence that the defendant's charge for a metallic circuit combined with a long-distance set is exorbitant. The well-known superiority of a metallic circuit to a grounded one in all essential features, and the greater cost of construction, make it reasonable to charge more for the use of the metallic circuit than for the other. The question of price is not strictly before the court, for the complainant does not desire this kind of service, and the defendant will not tolerate the combination which the complainant has made at any price.

The motion for re-argument is denied.

SEARLES *v.* MANN BOUDOIR CAR CO.

CIRCUIT COURT OF THE UNITED STATES, 1891.

[45 *Fed. Rep.* 330.]

ACTION to recover damages for alleged wrongful refusal of defendant's conductor to sell plaintiff a berth in a sleeping-car. On the 30th day of June, 1888, plaintiff entered defendant's sleeping-car at Meridian, Miss., and applied to the sleeping-car conductor for a berth. He received answer that all the space was sold, and he could not be accommodated. He claimed that there was a vacant upper berth that he should have. This upper berth was part of a section that had been bought by a Mr. Watson, to whom plaintiff applied for the upper berth, and was refused. There was a rule of defendant company to the effect that no one party could retain an entire section when there was applicants for berths.

HILL, J. (charging jury). The issues which you are to determine from the evidence, are: First. Did the conductor of the sleeping-car then owned and operated by the defendant company unlawfully and wrongfully refuse to sell to the plaintiff a ticket entitling him to the use and occupation of one berth in said car from Meridian, in this State, to Cincinnati, in the State of Ohio, as alleged in the declaration, and denied in the plea of defendant? To entitle the plaintiff to a verdict in his favor the burden is upon him to reasonably satisfy you from the evidence that the conductor then in charge of said car did unlawfully and wrongfully refuse to sell plaintiff such ticket, and place him in possession of one berth in said car. The uncontradicted testimony is that soon after the train to which the sleeper was attached left Meridian the plaintiff did apply to the conductor for a berth in the sleeper from Meridian to Cincinnati, and tendered him the money for the fare; to which the conductor replied that he had no vacant berth at his disposal, but that there was one berth in a section (or room, as they are constructed on this class of sleepers), all of which section had been purchased and paid for in New Orleans, and which upper berth was not then occupied by the purchaser, and who had only purchased the berth to Birmingham, Ala.; that if plaintiff would apply to Mr. Watson, the purchaser and occupant, he thought he would let plaintiff have it; to which plaintiff replied that he had the right to it, and demanded it on such right; to which the conductor replied that Mr. Watson had the right to its use to Birmingham, and that he could not deprive him of it, but that he would ask him for it for the use of the plaintiff. He did so apply, and Watson refused to surrender the use of the berth to the plaintiff. These facts being admitted, you are instructed that the defendant company had the right to sell the use of the whole section or room to Watson, and, having done so, and received the pay for it,

Watson was entitled to the use of the entire section for himself and such other persons as he might choose, and who was otherwise a proper person to occupy the sleeper to Birmingham, Ala., and that the conductor was guilty of no wrong in refusing to sell the use of this berth to the plaintiff, and put him in possession of it; and therefore you are instructed to return your verdict in favor of the defendant on the issue on the first count in the declaration.

The second issue which you will determine from the evidence is: Did the conductor unlawfully and wrongfully refuse to sell the plaintiff a ticket entitling him to the use of one berth on the sleeper from Birmingham to Cincinnati, as alleged in the second count in the declaration, and denied by the plea of the defendant? The burden of proving this allegation in the plaintiff's declaration is on him. There being some conflict in the testimony on this point, you are instructed that, while the conductor might have sold to plaintiff a ticket entitling him to the use of this berth from Birmingham to Cincinnati before reaching the former place, he was not under any obligation to do so, and his refusal so to do created no liability upon the defendant; but that, when the train arrived at Birmingham, and Watson's right of occupancy had ceased, and the plaintiff had applied for this or any other vacant and unoccupied berth in the sleeper, and tendered the usual fare for the use of it, and was refused by the conductor, then such refusal would have been wrongful, and the finding on this issue should be for the plaintiff, and entitle him to such reasonable, actual damages as in your judgment, from the proof, he has sustained by reason of being deprived of the use of the berth from Birmingham to Cincinnati, less the amount of the fare. You are further instructed that if the proof shows that application had been made for a berth in the sleeper by another man at Meridian, before the plaintiff made application, then the conductor had the right to sell the ticket for the berth to him in preference to the plaintiff. You are the sole judges of the weight to be given to the testimony of the witnesses on both sides. You will reconcile any conflict that may exist in the testimony of the witnesses, if you can; if not, then you will determine from all the testimony which most probably gave the facts truly. In considering the testimony you will consider the interest each witness may have in the result of your verdict, the manner in which they have testified, and the reasonableness of their statements in connection with all the testimony.

The jury returned a verdict in favor of defendant on both counts of the declaration.[1]

[1] *Compare:* Boudoir Car Co. *v.* Dupre, 54 Fed. 646; Palace Car Co. *v.* Taylor, 65 Ind. 153. — Ed.

BREDDON *v.* GREAT NORTHERN RAILWAY COMPANY.

EXCHEQUER, ENGLAND, 1858.

[28 *L. J. Exch. N. S.* 51.[1]]

POLLOCK, C. B. The question was substantially left to the jury whether, under all the circumstances, the detention of *these cattle* was the result of the snow, or was owing to the negligence or supineness of the company's servants. The jury have found upon that question in favor of the defendants, and rightly. There is a distinction between trains for passengers and for goods or cattle. The owners of goods or cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle or goods. The rates of carriage are different, and the cattle or goods sent by goods trains pay at a lower rate then they would if sent by passenger trains. The contract entered into was to carry the cattle to Nottingham without delay, and in a reasonable time under *ordinary circumstances*. If a snowstorm occurs which makes it impossible to carry the cattle, except by extraordinary efforts, involving additional expense, the company are not bound to use such means and to incur such expense.

FARNSWORTH *v.* GROOT.

SUPREME COURT OF NEW YORK, 1827.

[6 *Cow.* 698.]

ON error from the Schenectady C. P. Groot sued Farnsworth in a justice's court, in trespass, for obstructing the former in passing a lock on the Erie canal, and recovered $5. On appeal to the Schenectady C. P., Groot recovered $15.

In the latter court it was proved at the trial that Groot had arrived at the lock before Farnsworth, both passing west. It was regularly Groot's turn to pass the lock, which was not more than a quarter empty when Farnsworth arrived. Groot commanded a freight boat, and Farnsworth a packet boat. Farnsworth, on coming up, asked permission of Groot to pass first, which Groot refused. Farnsworth then demanded it as a right. On being refused, he ordered his hands to push back Groot's boat, which, on seeing the packet boat approaching, the latter had hauled up into the jaws of the lock. The boats were thus both wedged into the lock. Farnsworth's hands attempted to push back Groot's boat, but it was held fast by his hands. This was substantially the case, as made out by Groot, the plaintiff below. According to the defendant's witnesses, he (the defendant below) gave no orders to in-

[1] Only one opinion is printed. — ED.

terfere with Groot's boat; but it was some of the passengers who pushed the boat. After about half an hour's detention, the defendant below ordered his boat back, and the plaintiff below passed first.

The court below denied a motion for a non-suit, at the close of the plaintiff's testimony; and after the defendant had closed his case, decided that his matters of defence were insufficient; and so instructed the jury, who found for the plaintiff below.

The defendant below excepted; and the cause came here on the record and bill of exceptions.

Curia, per SAVAGE, C. J. It is important, first, to ascertain the relative rights of the parties. By the fourth section of the act for the maintenance and protection of the Erie and Champlain canals, and the works connected therewith, passed April 13, 1820 (sess. 43, c. 202), it is, among other things, enacted that, "if there shall be more boats, or other floating things, than one below, and one above any lock, at the same time, within the distance aforesaid (100 yards), such boats and other floating things shall go up and come down through such lock by turns as aforesaid, until they shall have passed the same; in order that one lock full of water may serve two boats or other floating things." By the tenth section (p. 186), it is enacted, "that, in all cases in which a boat, intended and used chiefly for the carriage of persons and their baggage, shall overtake any boat, or other floating thing, not intended or used chiefly for such purpose, it shall be the duty of the boatman, or person having charge of the latter, to give the former every practicable facility for passing; and, whenever it shall become necessary for that purpose, to stop, until such boat for the carriage of passengers shall have fully passed." And a penalty of $10 is imposed for a violation of this duty.

It was evidently the intention of the legislature, that packet boats should not be detained by freight boats; as it was known that the packets would move faster than the freight boats; and, in the language of the act, every facility was intended to be afforded them. But the right of passing when both are in motion might be of little use if the packets must be detained at every lock until all the freight boats there have passed before it. The fair construction of the act undoubtedly is, that the packets shall have a preference on any part of the canal; and, to be of any use, this right must exist at the locks as well as on any other part of the canal.

In my judgment, therefore, the defendant below had the right of entering the lock first, and the plaintiff below was the aggressor in attempting to obstruct the exercise of that right. Did the defendant, then, do more than he lawfully might in endeavoring to enforce his rights? No breach of the peace is pretended. No injury to the boat was done. The plaintiff below was detained, and so was the defendant; but the detention was occasioned by the fault and misconduct of the plaintiff himself. What right, under this view of the subject, has the plaintiff below to complain? The defendant below was the injured

party. The plaintiff below was indeed liable to a penalty; but that could not prevent the defendant below from using proper means to propel his boat, and to remove the obstruction caused by the plaintiff below. Suppose, in any part of the canal, the defendant below had overtaken the plaintiff below, and the latter had refused to permit the former to pass, and had placed his boat across the canal, would not the defendant below have been justified in attempting to remove the obstruction, without injury or breach of the peace? This, I presume, will not be denied. The defendant below has done no more. I think, therefore, the court below erred in refusing to instruct the jury that the plaintiff was not entitled to recover; and the judgment should be reversed. *Judgment reversed.*[1]

TIERNEY *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.

COURT OF APPEALS, NEW YORK, 1879.

[76 *N. Y.* 305.[2]]

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. Mem. of decision below, 10 Hun, 569.

This action was brought to recover damages to a car load of cabbages, delivered to defendant for transportation, alleged to have been sustained through the negligence of the defendant in not forwarding in due time.

DANFORTH, J. On receiving the cabbages in question and payment of freight, the defendants were bound to forward them immediately to their destination, — such was the duty of a carrier of goods at common law, for if he had not the means of transportation he might refuse to receive the goods, and such is the duty of a railroad corporation. This is so under the statute. By its terms the corporation is required to furnish "accommodations" only for such property as shall be offered a reasonable time before the arrival of the time fixed by public notice for the starting of its trains. Laws of 1850, chap. 140, § 36. And in the absence of a legal excuse the carrier is answerable for any delay beyond the time ordinarily required for transportation by the kind of conveyance which he uses. Blackstock *v.* N. Y. & Erie R. R. Co., 20 N. Y. 48; Mann *v.* Burchard, 40 Vt. 326; Illinois C. R. R. Co. *v.* McClennan, 54 Ill. 58.

None of the exceptions to the charge were well taken. The learned

[1] *Compare:* Briddon *v.* R. R., 28 L. J. (N. S.) Ex. 51; Heilliwell *v.* R. R., 7 Fed. 68; Johnson *v.* R. R., 90 Ga. 810; Galena Co. *v.* Rae, 18 Ill. 488; Selver *v.* Hall, 2 Mo. App. 557; Express Co. *v.* Smith, 33 Oh. St. 511; R. R. *v.* Nelson, 1 Cold. 272. — ED.

[2] This case is abridged. — ED.

trial judge instructed the jury "that it was the duty of the defendant to transport the property in question to New York by the first train, unless a reasonable and proper excuse for the delay is shown." To this there was an exception; "and in case there was a pressure of freight cars, the car in question should be forwarded before forwarding ordinary non-perishable property." "They made this contract in regard to perishable property, and it was their duty to forward it by the first train, unless there was such a pressure upon them of property of a similar kind to be transported, and which had arrived before this, to make it impossible," and again he says, "it would be a good excuse if there was a pressure of a similar kind of property to be forwarded, but it would not be an excuse if there was a pressure of other non-perishable property to be forwarded." To this defendant excepted.

The defendant's counsel requested the judge to charge "that defendant is not liable for delay, if such delay was caused by an unusual press of business, and an accumulation of cars beyond the ordinary capacity of the road," and the judge replied, "within the limitations I have now given, I so charge"—to this qualification there was an exception. It will be seen that the attention of the trial court was not called to the question of right of priority to transportation among freights received at different times. The whole charge is applicable to property received at the same time, and does not necessarily, nor by any fair implication, direct a discrimination in favor of perishable property received after non-perishable; no request to charge in regard to it was made; the testimony did not indicate when the property was received which was sent forward on the 8th and on the 9th before 3.20 in the afternoon. The plaintiff's car left Albany at seven, and to make the question available to the defendant the judge should have been asked to direct the jury in regard to it. Elwood *v.* W. U. Tel. Co., 45 N. Y. 549. I do not think that the question is before us, nor indeed that the evidence was sufficient to raise it in the trial court. The case as presented is that of freight at East Albany; when it, except that of the plaintiff's, reached there does not appear. It was all in the possession and control of the defendant at one and the same time. But if the charge of the trial judge is construed as instructing the jury that the pressure of non-perishable property should not excuse the delay, I am of the opinion that he was right, and the principle of law enunciated by him sound. Wibert's Case, *supra*, is not to the contrary. There the question was not presented as to the duty of a carrier to discriminate in favor of perishable freight over non-perishable. That decision, therefore, should not control this case. It is itself placed upon a qualification to the peremptory direction of the statute, and while it should be followed in similar cases, is not to be extended. The distinction suggested by the charge exists. In Cope *v.* Cordova, 1 Rawle, 203, the court, while holding that the liability of the carrier by vessel ceases when he lands the goods at a proper wharf, adds, "it is beside the question to say that perishable articles may be landed at improper

times to the great damage of the consignee, — when such special cases arise they will be decided on their own circumstances." Such a case was presented to this court in McAndrew *v.* Whitlock, 52 N. Y. 40, where a carrier was held liable for the loss of certain perishable property, licorice, under circumstances which would have exonerated him from liability if it had not been perishable. In Marshall *v.* N. Y. C. R. R. Co., 45 Barb. 502 (affirmed by this court, 48 N. Y. 660), it was held by the Supreme Court that where two kinds of property, one perishable and the other not, are delivered to a carrier at the same time by different owners for transportation and he is unable to carry all the property, he may give preference, and it is his duty to do so, to that which is perishable. In this court the case turned upon other points; but referring to the rule above stated, Hunt, J., says: "The principle laid down is a sound one, and in a proper case would I think be held to be the law. It is not here important."

The rule is a correct one and is equally applicable to the duty of the carrier in whose hands freight has so accumulated that he must give priority to one kind over another.

In requiring the defendant to receive all kinds of property, including perishable, the statute may be construed as imposing upon it such obligations and duties as are required for the proper and safe carriage of that kind of goods. In that respect assimilating a railway corporation to a common carrier, bound by the obligations of the common law to carry safely and immediately the goods intrusted to him, — having in the exercise of care, speed, and priority of transportation, some reference to the natural qualities of the article and the effect upon it of exposure to the elements. McAndrew *v.* Whitlock, 52 N. Y. 40; Marshall *v.* N. Y. C. R. R. Co., 48 N. Y. 660; Peet *v.* Chicago & N. W. R. R. Co., 20 Wis. 594. We may also take into consideration the fact that the freight in question was not only perishable but was known to be so by both parties and was shipped as such and with knowledge on the plaintiff's part of the custom of the defendant to give a preference in transportation to such goods, and the parties, though silent, may be regarded as adopting the custom as part of the contract.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY *v.* KELLY.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, 1908.

[160 *Fed.* 316.[1]]

LURTON, C. J. What, then, was the basis for the claim of a violation of this statute? For one thing it is said that, during the time of

[1] The principal point is extracted. — ED.

delay, other applicants in other parts of the city were given connection. But as these other applicants were within other cable districts in which the cables were not congested, this cannot be said to be a discrimination. This is not evidence of partiality shown them, and was not a discrimination against Kelly, who was not similarly situated. Of course, if we are to construe this statute as one which overrides the business methods under which the company carried its wires in cables to the different areas to be served, distributing the wires from stations conveniently located within such business or cable districts, then, to serve any applicant anywhere ahead of Kelly would be an illegal discrimination. But such a construction would lead to most unjust results, and practically destroy every such company. If such a company, in good faith, determines for itself the limits within which it will conduct such a business, and if, in accordance with the usual and approved methods of well-managed companies, it divides that area into districts to be served by wires carried in cables to a point within it convenient for distribution, there is no discrimination at common law or under the statute, unless an applicant within a particular district is discriminated against and others served within the same general area, in like situation and under like conditions with himself. This was the view of the matter entertained by the court below, for the jury were instructed that the question of discrimination depended upon the conduct of the company in "the territory where he was situated," and the case was made to turn by the charge upon the question, "Had the company furnished other men on applications for service in that locality when their cable lines were filled?" "Could they make arrangements to supply other men and did they do it? Or, on the other hand, did they treat them all alike when that condition of things appertained?" The suggestion made here in argument, that it was the immediate duty of the company to provide additional wires if all those in the existing cable were in use, and that the failure to do this was a discrimination under the statute, was not by any charge given or refused raised below, and is only relevant here as arising under the alleged general purpose of the statute to compel the service of all applicants regardless of conditions and methods of carrying on such a business. We have already expressed our view of this above. There might be much in the suggestion, if the business of the company had been carried on by giving to each applicant an aërially supported pair of wires running direct from the exchange to each private telephone. If it had also appeared that it was the practice and custom of the company to put up such a pair of wires whenever service was required, there would be evidence tending to show discrimination if such connection should be denied or unduly delayed to one and furnished to others. That method of doing business, as we may judicially take notice, does prevail where the patrons are few in number. But there was evidence tending to show that where the patrons run up into the thousands, the cable system, to avoid confusion of wires, becomes necessary for efficient service. In

Memphis the city ordinance compelled the wires to go underground through the business part of the city, and this, aside from other considerations, involved the carrying of the wires deemed necessary for the business of a particular district in leaden-covered cables and their distribution from a box conveniently situated within the district. If the cable in particular district should become congested it was usual, if the new business promised a fair return, to carry another cable to the same district and make a new point of distribution.

Telephone companies, like similar *quasi* public corporations, are under a general common-law obligation to supply reasonably adequate facilities for supplying the service which they hold themselves out to do. This obligation in a proper proceeding, may be enforced by compelling an enlargement of the plant, or by an action for damages due to disregard of this duty. The principle applicable to common carriers proper is sufficiently stated with its qualifications in 5 Am. & Eng. Cyc. of Law, 167, 168, and many illustrative cases are cited. But we cannot conceive that this common-law obligation is within the intent and purpose of this severe penal act. If, as we have before stated, the business of the company was conducted by individual wires aërially supported between the exchange and the telephones of the patrons, and it was its usual custom to string a pair of wires upon the plant already provided when a new customer desired a telephone, a very different question would be presented. There was evidence tending to show that to put in a new cable in order to serve Kelly would have taken some weeks at least, and would have cost the company about $7000, if such a cable was strung as they were using. We cannot believe that the Tennessee Legislature ever intended that the common law duty of providing facilities reasonably adapted to the business which might have with reason been anticipated should be enforced by the imposition of an arbitrary penalty of $100 per day from the time when such connection might have been supplied had the company's cable capacity not been full. This construction would operate to ruin any ordinary company, with profit only to such as might choose to prosecute a penal action against them. No such construction ought to be placed upon such a penal statute if it be susceptible of a more just and reasonable one. This we have no difficulty in doing, inasmuch as we regard the statute as intended only to prevent a partial and discriminating service, having regard to the capacity of the company, and the usual and customary method under which its operations were conducted.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* RENFROE.

SUPREME COURT OF ARKANSAS, 1907.

[82 *Ark.* 145.]

WOOD, J. (after stating the facts). The contract of shipment, as evidenced by the bill of lading, was entered into between appellant and appellee. It was for free shipment over appellant's line and connecting carriers from Alma, Ark., to Kansas City, Mo. Appellant having accepted the berries for through transportation, it was its duty to furnish cars suitable for the purpose. Strawberries were perishable goods, and appellant having undertaken to transport them to market, it was its duty to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract.

"If," says Mr. Hutchinson, "the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier, where he accepts the goods, to provide such cars for their carriage. Hutch. Car. (3d ed.) §§ 505, 508; Beard *v.* Ill. Cent. Ry. Co., 79 Ia. 518; Chicago & A. Rd. Co. *v.* Davis, 159 Ill. 53; St. Louis, I. M. & S. Ry. Co. *v.* Marshall, 74 Ark. 597.

It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in New York, Philadelphia & Norfolk R. Co. *v.* Cromwell, 49 L. R. A. 462. That was a case that involved the transportation of strawberries. The court said: "The California Fruit Transportation Company, for a consideration, furnished its cars to the plaintiff in error [the railway company]. These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another. The undertaking of the plaintiff in error [railway company] was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error,

the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it."

It matters not in the case at bar that the refrigerator car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict, that appellant not only undertook to furnish the car, but also to ice the same. Even if the law did not impose this upon appellant as a duty, the proof shows that it undertook, for a valuable consideration, to furnish refrigeration as well as the car. The sum of $50 was charged and paid for that service to appellant.

The evidence was sufficient to warrant the jury in finding that appellant negligently failed to perform this service, that it failed to carry out its contract to ice the car and thus to furnish a suitable car.

True, in the case of connecting carriers the presumption is that the delivering carrier caused the injury. Kansas City S. Ry. Co. *v.* Embry, 76 Ark. 589; St. Louis, I. M. & S. Ry. Co. *v.* Marshall, *supra;* St. Louis, I. M. & S. Ry. Co. *v.* Coolidge, 73 Ark. 114; St. Louis S. W. Ry. Co. *v.* Birdwell, 72 Ark. 502. But this presumption only obtains in the absence of proof locating the negligent carrier. Here the evidence warranted the jury in finding that appellant was negligent in failing to use ordinary care to see that the car was kept properly iced at Van Buren before it started for Kansas City.

Finding no error, the judgment is affirmed.

STATE EX REL CRANDALL *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

SUPREME COURT OF NEBRASKA, 1904.

[72 *Neb.* 542.[1]]

THE record shows that considerable ill feeling exists between some of the members of the Farmers' Grain & Lumber Company and Mr. Crandall, and that certain charges and complaints had been made to the railway company that Crandall had been shipping grain under the guise of mill products by covering part of the contents of the car, and thereby obtaining more than his share of cars. We are convinced, however, that these charges are not warranted by the evidence, and that Crandall was honest and sincere in his opinion that as a miller he was entitled to all the cars the railroad could furnish for his use in shipping all kinds

[1] The first part of the opinion reviewing the facts is omitted. — ED.

of mill products, including therein "cracked corn," and that as a grain dealer he was entitled to an equal number of cars with his competitor, excluding cars used for "cracked corn," "chop," etc. We are further convinced that no intention on the part of the respondent's agents or officers to discriminate unfairly against Mr. Crandall has been shown, and that they have been placed in the difficult position of trying to do business with two active and jealous competitors in such a manner as to remain upon good terms with both, a task almost beyond human power.

> "How happy could" they "be with either,
> Were t'other dear charmer away!"

The brief of the relator is largely devoted to the proposition that a common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates; that it has no right to discriminate or favor one shipper over another in rates or facilities, and that such duties of common carriers are enforceable by *mandamus*. With this proposition we agree. Since the briefs in this case were filed, the case of State *ex rel* McComb *v.* Chicago, B. & Q. Ry. Co., 99 N. W. 309, has been decided by this court. That decision is in accord with the principles contended for by relator, but with the further qualification that, when the carrier has furnished itself with the appliances necessary to transport the amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily, or at long intervals of time. It appears that ordinarily the respondent has cars enough to meet the usual requirements of shippers, but that, owing to the long coal strike in the East, conditions had been abnormal, and the railroad company had at this time been unable to have returned to its line a large number of its cars which had been sent to points upon other railroads, and that it had found it necessary to impose an extra charge in the nature of a *per diem* for cars which were retained by other lines for more than thirty days, with the purpose of procuring an expeditious return of the cars; that, owing to this scarcity, it was impossible to furnish at this time all the cars necessary for use, not only by the relator, but by all other grain shippers along its lines in this state. Under this state of facts the modifying principle above quoted applies, and, if no unjust discrimination appears, no shipper has the right to complain because he has not been able to obtain carriage for all the goods which he may desire transported.

We are of the opinion that no failure of duty or unjust discrimination has been shown upon the part of respondent, and that the judgment of the district court should be affirmed.

MAJESTIC COAL AND COKE COMPANY *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, 1908.

[162 *Fed.* 810.]

KOHLSAAT, Circuit Judge. This cause is now before the court on demurrer and motion to dissolve temporary injunction. Complainant filed its bill to restrain defendant from including certain private cars and certain so-called "foreign fuel cars" in estimating the distributive share or quota of complainant in and to defendant's "system cars," so called. From the bill it appears that heretofore complainant has been awarded its *pro rata* number of "system cars" without reference, and in addition to the private and foreign fuel cars employed in connection with its business. It is alleged in the bill that in this way it has been able to work its mine at its full capacity, whereby it could produce coal at reduced rates. This rate manifestly would be available for interstate shipments, although the bill alleges, and the demurrer admits, that the private and foreign fuel cars were engaged solely in intrastate trade. It further appears from the bill that complainant has entered into contracts on the basis of the old allotment of cars, which it cannot afford to carry out on the new basis of distribution of system cars.

It is claimed for complainant that, inasmuch as the private and foreign fuel cars deal only with intrastate transactions, the transactions in question do not come within the terms or spirit of the interstate commerce act. It is the plain intent of the act that railroad companies shall not extend any advantage to any shipper. It follows, therefore, that any act of a railroad company which directly or indirectly results in the extension of advantage to any one or more shippers over other shippers dealing with that road in interstate commerce is forbidden by the statute. It appears from the bill that the defendant is engaged in such commerce. There exists, therefore, this situation, viz.: The railroad is giving to the coal company facilities, in intrastate commerce, it may be, which enable the latter to place its coal upon the market for interstate shipment at a less price than that at which other coal mines can afford to sell coal. Of course, such a situation might arise from other causes, as, for instance, more accessible strata or greater quantities of coal or better mining facilities or lower wages. These advantages might be lawful in themselves, and not at all within the statute, and would be proper data to be considered in fixing the quota of cars. The law, however, deals with the interstate carrier. It may not in any way become a party to complainant's unfair advantage over other shippers in affording greater facilities *pro rata* to one shipper than to another. It is a creature of the law, and amendable to the varying provisions thereof. It was quite within the power

of Congress to enact that a railroad shall not lend its great advantages to any enterprise which in any way seems to discriminate in favor of or against any person dealing with it. That it is doing so in this case is beyond question.

The fact that the new rule would work hardship upon complainant or place it at disadvantage is one which the court may not cousider. Complainant's claim in the premises, as appears from the bill, comes within, and is repugnant to, the statute, and cannot be sustained. This finding is in accordance with the decisions in U. S. *ex rel.* Pitcairn Coal Company *v.* B. & O. R. R. Co. (C. C.), 154 Fed. 108, and Logan Coal Co. *v.* Penn. R. R. Co. (C. C.), 154 Fed. 497, and by the decision of the Interstate Commerce Commission July 11, 1907, in the cases of Railroad Commission of Ohio *v.* Hocking Valley Ry. Co. and Wheeling & Lake Erie R. R. Co., 12 Interst. Com. R. 398.

Considerable space is given in the briefs to the question of jurisdiction. In view of what has been said above, it becomes unnecessary to pass upon that question further than to say that the demurrer is sustained, the bill dismissed for want of equity, and the temporary injunction dissolved. Mr. H. B. Arnold, counsel for the interstate commission, was allowed to, and did, file a brief herein.

MICHIGAN CENTRAL RAILROAD COMPANY *v.* SMITHSON.

SUPREME COURT OF MICHIGAN, 1881.

[45 *Mich.* 212.[1]]

COOLEY, J. The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose and which are upon wheels adapted to its gauge. It is compelled to do so — *First*, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to any one. It is compelled to do so, *second*, by its own interest. To attempt to stop every car offered to it at its own *termini*, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business for which it must increase its charges to make up if possible for what it would lose. But *third*, the statute itself requires it. It is provided by General Laws 1873, p. 99, that "every corporation owning a road in use, shall, at reasonable

[1] Only the dictum for which this case is chiefly known is printed. — ED.

times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation." The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* NORTH CAROLINA CORPORATION COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1907.

[206 *U. S.* 1.[1]]

2. THE order was arbitrary and unreasonable, because when properly considered it imposed upon the Coast Line a duty foreign to its obligation to furnish adequate facilities for those travelling upon its road.

This rests upon the assumption that as the order was based not upon the neglect of the Coast Line to afford facilities for travel over its own road, but because of the failure to furnish facilities to those travelling on the Coast Line who desired also to connect with and travel on the Southern road, therefore the order was in no just sense a regulation of the business of the Coast Line. This reduces itself to the contention that, although the governmental power to regulate exists in the interest of the public, yet it does not extend to securing to the public reasonable facilities for making connection between different carriers. But the proposition destroys itself, since at one and the same time it admits the plenary power to regulate and yet virtually denies the efficiency of that authority. That power, as we have seen, takes its origin from the *quasi* public nature of the business in which the carrier is engaged, and embraces that business in its entirety, which of course includes the duty to require carriers to make reasonable connections with other roads, so as to promote the convenience of the travelling public. In considering the facts found below as to the connection in question, that is, the population contained in the large territory whose convenience was subserved by the connection, and the admission of the railroad as to the importance of the connection, we conclude that the order in question, considered from the point of view of the requirements of the public interest, was one coming clearly within the scope of the power to enforce just and reasonable regulations.

[1] In his opinion, Mr. Justice WHITE reduces the objections to the order of the commission directing the roads to make its time-table fit in with that of a connecting road to several italicized propositions which he then proceeds to refute. Only one of these is printed here. — ED.

BALLENTINE *v.* NORTH MISSOURI RAILROAD CO.

SUPREME COURT OF MISSOURI, 1886.

[40 *Mo.* 491.[1]]

FAGG, J., delivered the opinion of the court.

The law defining and regulating the duties of railroad companies as common carriers, is so well settled now as to admit of little doubt or controversy. As preliminary, however, to the determination of the questions involved in this case, it may be stated that the laws of the State require each railroad corporation to "furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation," &c. R. C. 1855, p. 435, § 44. The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered. Galena & Chicago R. R. Co. *v.* Rae *et al.*, 18 Ill. 488; Weibert *v.* N. Y. & Erie R. R. Co., 19 Barb. 36. Any other construction of the statute would be unjust to the railroad companies without benefiting the public.

It seems to have been the theory upon which the petition proceeded in this case, that it was the duty of the defendant to have shipped the live stock in the order of time in which it was offered with reference to the entire line of its road, and not to any particular station. This is altogether unreasonable, and in its practical operation would work great hardships upon all companies. Its duty in this respect, then, must be understood in reference to each particular station, and not to the operation of the road as a whole.

Whilst it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various stations

[1] This case is abridged. — ED.

for receiving passengers and freight along the entire line of its road, as to afford a reasonable amount of accommodation for all. Or, to state it differently, no one station should be furnished with means of transportation to the prejudice of another, but a distribution should be made among all in something like a just proportion to the amount of business ordinarily done at each. Its duty is to receive all freight that may be offered, and within a reasonable time, and in the order in which it is offered, to transport the same to any other point on the line of its road that may be designated by the owner or other person having charge of it. This duty to the public must be performed in good faith, and without partiality or favor to any one. Every individual in the community, by complying with the prescribed rules and regulations of the company, has an equal right to demand the performance of this duty, and the law does not excuse a discrimination in this respect any more than it does a discrimination in favor of any particular station on the line of its road. In every proceeding, therefore, against a railroad company for neglect of its duty, either in receiving or shipping freight in the order in which it is offered, the good faith of its conduct in the matter complained of is a proper subject of inquiry, and if found to be wanting, should receive the severest condemnation and censure from the courts of the country.[1]

AYRES *v.* CHICAGO AND NORTHWESTERN RAILWAY.

SUPREME COURT OF WISCONSIN, 1888.

[71 *Wis.* 372: 37 *N. W.* 432.]

THE amended complaint is to the effect that the defendant, being a common carrier engaged in the transportation of live stock, and accustomed to furnish cars for all live stock offered, was notified by the plaintiffs, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station La Valle, and three at its station Reedsburg, ready for loading on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done

[1] Helliwell *v.* Grand Trunk, 17 Fed. 68; Chicago Co. *v.* Fisher, 31 Ill. App. 36; Deming *v.* Grand Trunk, 48 N. H. 155; Tennessee R. R. *v.* Nelson, 1 Cold. 272; R. R. *v.* Nicholson, 61 Tex. 491. — ED.

so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1,700.[1]

CASSODAY, J. We are forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson *v.* C. & N. W. R. Co., 61 Wis. 601, and is supported by the logic of numerous cases. North Penn. R. Co. *v.* Commercial Bank, 123 U. S. 727; Moulton *v.* St. P., M. & M. R. Co., 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; Lindsley *v.* C., M. & St. P. R. Co., 36 Minn. 539; Evans *v.* F. R. Co., 111 Mass. 142; Kimball *v.* R. & B. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Rixford *v.* Smith, 52 N. H. 355; Clarke *v.* R. & S. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; South & N. A. R. Co. *v.* Henlein, 52 Ala. 606; Baker *v.* L. & N. R. Co., 10 Lea, 304, 16 Am. & Eng. R. Cas. 149; Philadelphia W. & B. R. Co. *v.* Lehman, 56 Md. 209; McFadden *v.* M. P. R. Co., 92 Mo. 343; 3 Am. & Eng. Cyclop. Law, pp. 1–10, and cases there cited. This is in harmony with the statement of PARKE, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of *any* description, *but his obligation is to carry according to his public profession.*" Johnson *v.* Midland R. Co., 4 Exch. 372. Being a common carrier of live stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier. Texas & P. R. Co. *v.* Nicholson, 61 Tex. 491; Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613; Ballentine *v.* N. M. R. Co., 40 Mo. 491; Guinn *v.* W., St. L. & P. R. Co., 20 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been suf-

[1] The statement of facts and part of the opinion are omitted. — ED.

ficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different States. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler *v.* State, 58 Wis. 46. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem *v.* Blake, 16 Wis. 102; Beckmann *v.* Henn, 17 Wis. 412; Noonan *v.* Ilsley, 21 Wis. 144; Great Western R. Co. *v.* Bacon, 30 Ill. 352; Brown *v.* Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination and might have been emptied with

reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did — to wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest errror, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

By the Court. — Ordered accordingly.

PEOPLE *v.* CHICAGO AND ALTON RAILROAD.

SUPREME COURT OF ILLINOIS, 1889.

[130 *Ill.* 175: 22 *N. E.* 857.]

BAILEY, J. This was a petition for a *mandamus*, brought by the people of the state of Illinois, on the relation of the attorney-general, against the Chicago & Alton Railroad Company, to compel said company to establish and maintain a station for the receipt and discharge of passengers and freight at Upper Alton, in Madison County. . .

There is, so far as we have been able to discover, no provision of any statute which can be appealed to in support of the prayer of the petition. Neither in the defendant's charter nor in any other act of the general assembly does there seem to be any attempt to prescribe the rules by which the defendant is to be governed in the location of its freight and passenger stations, or to confer upon the Circuit Court the power to interpose and direct as to their location. It is plain that the act of 1877, the only one to which we are referred in this connection, can have no application. That act provides "that all railroad companies in this state, carrying passengers or freight, shall, and they are hereby required to, build and maintain depots for the comfort of passengers, and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their roads having a population of five hundred or more." 2 Starr & C. St. 1924. While it is true that Upper Alton is a town having a population of more than 500, it affirmatively appears that it is not a place where the defendant has been in the practice of receiving and delivering passengers and freight, and so is not within the provisions of said act. The petition seeks to have the defendant compelled to establish a station where none has heretofore existed, while the statute merely requires the erection of suitable depot buildings at places where the railway company has already located its stations, and is in the practice of receiving and discharging passengers and freight. In point of fact, the attorney-general, in his argument upon the rehearing, admits that there is no statute upon which his prayer for a *mandamus* can be based; the position now taken by him being that upon the facts alleged in the petition and admitted by the demurrer, the legal duty on the part of the defendant to establish a freight and passenger station on its line of railway in the town of Upper Alton arises by virtue of the principles of the common law.

It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such. This doctrine has been repeatedly announced by this and other courts. Thus, in Marsh *v.* Railroad Co., 64 Ill. 414, which was a bill for the specific performance of a contract by which the railway company agreed to locate its passenger and freight depots at a particular point in a certain town, and at no other point in said town,

we said: "This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad companies are incorporated by authority of law, not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity; the general welfare being largely dependent upon these modes of intercommunication, and the manner of carrying on their operations." In the same case, in holding that the contract there in question ought not to be specifically enforced, we further said: "Railroad companies, in order to fulfil one of the ends of their creation, — the promotion of the public welfare, — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require."

In Railway Co. *v.* People, 120 Ill. 200, which was a petition for a *mandamus* to compel the railway company to repair, generally, a certain portion of its road, and to increase its passenger trains thereon, we said: "There can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair, and in a safe condition. Nor is there any doubt of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. . . . The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road; hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted."

It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points, and in such manner, as to subserve the public necessities and convenience that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void. Railroad Co. *v.* Mathers, 71 Ill. 592; Railroad Co. *v.* Mathers, 104 Ill. 257; Bestor *v.* Wathen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309; Railroad Co. *v.* Ryan, 11 Kas. 602; Railroad Co. *v.* Seely, 45 Mo. 212; Holladay *v.* Patterson, 5 Or. 177; Tayl. Corp. § 162, and authorities cited.

We have now to consider whether in the light of the principles above laid down, a right to the relief prayed for is sufficiently shown by the petition. There can be no doubt that the act sought to be enforced (the establishment and maintenance of a freight and passenger station on the defendant's line of railway at a convenient point within the town of Upper Alton) is sufficiently specific to be enforced by *mandamus;* and it only remains to be seen whether the right to

have its performance enforced is shown to be clear and undoubted. It should be observed that there is no controversy as to the facts; the allegations of the petition being, for all the purposes of this appeal, conclusively admitted by the demurrer.

The petition undertakes to show the public importance and necessity of the station asked for in two ways: *First*, by alleging the facts and circumstances which tend to prove it; and, *secondly*, by directly averring it. It cannot be doubted, we think, that the facts alleged make out a clear and strong case of public necessity. They show that Upper Alton is a town of over 1,800 inhabitants, situated on the line of the defendant's railway about midway between two other stations seven miles apart. The residents of the town and vicinity are shown to be possessed of at least the ordinary inclination to travel by railway, and it is averred that many of them have occasion and desire to travel by the defendant's railway between Upper Alton and other points on the line of said railway. Various manufacturing and other business enterprises are shown to be carried on within the town, creating a necessity for the use of said railway for the transportation of manufactured articles, merchandise, and other freights. To avail themselves of transportation upon trains which pass by their doors, the inhabitants of Upper Alton are compelled to go and transport their freights by other conveyances to a neighboring town about three and one-half miles away. Then, as we have already said, the petition directly avers, and the demurrer admits, that the accommodation of the public living in and near said town requires, and long has required, the establishment of a passenger and freight depot on the line of its road within said town. Unless, then, there is some explanation for the course pursued by the defendant which the record does not give, we cannot escape the conviction that its conduct in the premises exhibits an entire want of good faith in its efforts to perform its public functions as a common carrier, and an unwarrantable disregard of the public interests and necessities. It cannot be admitted that the discretion vested in the defendant in the matter of establishing and maintaining its freight and passenger stations extends so far as to justify such manifest and admitted disregard of its duties to the public.

We are of the opinion that the petition shows a clear and undoubted right on the part of the public to the establishment and maintenance of a freight and passenger station on the line of the defendant's railway in the town of Upper Alton, and it therefore follows that the demurrer to the petition should have been overruled.

MOBILE & OHIO RAILROAD *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1890.

[132 *Ill.* 559 : 24 *N. E.* 643.]

SCHOLFIELD, J.[1] Railway stations for the receipt and discharge of passengers and freight are for the mutual profit and convenience of the company and the public. Their location at points most desirable for the convenience of travel and business is alike indispensable to the efficient operation of the road and the enjoyment of it as a highway by the public. Necessarily, therefore, the company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must, manifestly, rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point where the welfare of the company and the country in general require that it should be changed to some other point. And so we have held that a railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. Bestor *v.* Wathen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309; Marsh *v.* Railroad Co., 64 Ill. 414; Railroad Co. *v.* Mathers, 71 Ill. 592; Same Case again in 104 Ill. 257; Snell *v.* Pells, 113 Ill. 145. The power of election in the location of the line of the railway referred to in People *v.* Louisville & N. R. Co., 120 Ill. 48, results from the franchise granted by the charter to exercise the right of eminent domain, and is therefore totally different from the power of locating stations, which, from its very nature, is a continuing one. And so we said in Marsh *v.* Railroad Co., *supra*, where a bill had been filed for the specific performance of a contract to locate and maintain a station at a particular part: "Railroad companies, in order to fulfil one of the ends of their creation — the promotion of the public welfare — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." And so, again, we said in Railroad Co. *v.* Mathers, *supra:* "Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it." And in the very recent case of People *v.* Chicago & A. R. Co., 130 Ill. 175, where we awarded a *mandamus* commanding the location and

[1] Part of the opinion only is given. — ED.

maintaining of a station at a point where no station had before been located and maintained, we said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaiuing their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public."

The rule has been so often announced by this court that it is unnecessary to cite the cases; that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused. The burden was on the relator to prove a case authorizing the issuing of the writ, and in our opinion that proof has not been made. . . . The judgment of the Circuit Court is reversed, and the cause is remanded to that court with direction to enter judgment for the respondent.

NORTHERN PACIFIC RAILROAD *v.* WASHINGTON.

SUPREME COURT OF THE UNITED STATES, 1892.

[142 *U. S.* 492.]

A petition in the name of the Territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties in the territory, was filed in the District Court of the fourth judicial district of the territory on February 20, 1885, for a *mandamus* to compel the Northern Pacific Railroad Company to erect and maintain a station at Yakima City, on the Cascade branch of its railroad, extending from Pasco Junction, on the Columbia River, up the valley of the Yakima River and through the county of Yakima, towards Puget Sound, and to stop its trains there to receive and deliver freight, and to receive and let off passengers.[1]

Mr. JUSTICE GRAY, after stating the case as above, delivered the opinion of the Court.

A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

If, as in Railroad *v.* Hall, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by *mandamus*. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide-water (as was held to be the case in

[1] Part of the statement of the case is omitted. — ED.

State *v.* Railroad, 29 Conn. 538), and it has so constructed its road and used it for years, it may be compelled to continue to do so. And *mandamus* will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. Railway *v.* Mississippi, 112 U. S. 12; People *v.* Railroad, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or to maintain its road to that point when it would not be remunerative. Railway Co. *v.* Queen, 1 El. & Bl. 858; Id. 874; Com. *v.* Railroad, 12 Gray, 180; State *v.* Railroad, 18 Minn. 40.

The difficulties in the way of issuing a *mandamus* to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals.

The defendant's charter, after authorizing and empowering it to locate, construct, and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the road, and vesting it with "all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth," enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road," is significant.

To hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of *mandamus,* would be inconsistent with many decisions of high authority in analogous cases.

The constitution of Colorado, of 1876, art. 15, § 4, provided that "all railroads shall be public highways, and all railroad companies shall be common carriers;" and that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Section 6 of the same article was as follows: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing car or motive power." The General Laws of Colorado, of 1877, c. 19, § 111, authorized every railroad company "to cross, intersect, or connect its railways with any other railway," "to receive and convey persons and property on its railway," and "to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of said railway." This court held that section 6 of article 15 of the constitution of Colorado was only declaratory of the common law; that the right secured by section 4 to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Chief Justice WAITE, in delivering the opinion, said: "No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there because it has established joint depot accommodations and provided facilities for doing a connecting busi-

ness with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 681, 682.

The Court of Appeals of New York, in a very recent case, refused to grant a *mandamus* to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1,200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Judge DANFORTH, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station-houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and to erect and maintain all necessary and convenient buildings and stations "for the accommodation and use of their passengers, freight, and business," and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than an inquest for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station-house, nor the enlargement of one." "As to that, the

statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation." "Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character; nor can it by any fair or reasonable construction be implied." People *v.* Railroad, 104 N. Y. 58, 66, 67.

In Com. *v.* Railroad, the Supreme Judicial Court of Massachusetts, in holding that a railroad corporation, whose charter was subject to amendment, alteration, or repeal at the pleasure of the legislature, might be required by a subsequent statute to construct a station and stop its trains at a particular place on its road, said: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of the state, this would be a case manifestly requiring and authorizing legislative interference under the clause in question; and on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine, and their determination on this point must be conclusive." 103 Mass. 254, 258.

Upon the same principle, the Supreme Judicial Court of Maine compelled a railroad corporation to build a station at a specified place on its road in accordance with an order of railroad commissioners, expressly empowered by the statutes of the state to make such an order, and to apply to the court to enforce it. Laws Me. 1871, c. 204; Commissioners *v.* Portland & O. R. Co., 63 Me. 270.

In Railway Co. *v.* Commissioners, a railway company was held by Lord Chancellor SELBORNE, Lord Chief Justice COLERIDGE, and Lord Justice BRETT, in the English Court of Appeal, to be under no obliga-

tion to establish stations at any particular place or places unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and goods at a station once established and used for the purpose of traffic only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by Act of Parliament. 6 Q. B. Div. 586, 592.

The decision in State *v.* Railroad Co., 17 Neb. 647, cited in the opinion below, proceeded upon the theory (inconsistent with the judgments of this court in Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., and of the Court of Appeals of New York in People *v.* Railroad Co., above stated) that, independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.

The opinions of the Supreme Court of Illinois, though going further than those of most other courts in favor of issuing writs of *mandamus* to railroad corporations, afford no countenance for granting the writ in the case at bar. In People *v.* Railroad Co., 120 Ill. 48, a *mandamus* was issued to compel the company to run all its passenger trains to a station which it had once located and used in a town made a terminal point by the charter, and which was a county seat, because the corporation had no legal power to change its location, and was required by statute to stop all trains at a county seat. In People *v.* Railroad Co., 130 Ill. 175, in which a *mandamus* was granted to compel a railroad company to establish and maintain a station in a certain town, the petition for the writ alleged specific facts making out a clear and strong case of public necessity, and also alleged that the accommodation of the public living in or near the town required, and long had required, the establishment of a station on the line of the road within the town; and the decision was that a demurrer to the petition admitted both the specific and the general allegations, and must therefore be overruled. The court, at pages 182, 183, of that case, and again in Railroad Co. *v.* People, 132 Ill. 559, 571, said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public." But in the latter case the court also said: "The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to

its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point." Page 570. "The rule has been so often announced by this court that it is unnecessary to cite the cases, that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established." Page 572. And upon these reasons the writ was refused.

Section 691 of the Code of Washington Territory of 1881, following the common law, defines the cases in which a writ of *mandamus* may issue as "to any inferior court, corporation, board, officer, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." By the same code, in *mandamus*, as in civil actions, issues of fact may be tried by a jury; the verdict may be either general or special, and, if special, may be in answer to questions submitted by the court; and material allegations of the plaintiff not denied by the answer, as well as material allegations of new matter in the answer not denied in the replication, are deemed admitted, but a qualified admission cannot be availed of by the other party, except as qualified. Sections 103, 240, 242, 694, 696; Breemer *v.* Burgess, 2 Wash. T. 290, 296; Gildersleeve *v.* Landon, 73 N. Y. 609. The replication filed in this case, not being copied in the record sent up, may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.

The leading facts of this case, then, as appearing by the special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles further, to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for *mandamus* was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima City, but the cost of building one would be $8,000, and the expense of maintaining it $150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and

to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco Junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City, as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. It also appears of record that, after the verdict and before the district court awarded the writ of *mandamus*, the county seat was removed, pursuant to an act of the territorial legislature, from Yakima City to North Yakima.

The *mandamus* prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (Attorney-General *v.* Boston, 123 Mass. 460, 479; Code Wash. T. § 2171); and no demand upon the defendant was necessary before applying for the writ (Com. *v.* Commissioners, 37 Pa. St. 237; State *v.* Board, 38 N. J. Law, 259; Mottu *v.* Primrose, 23 Md. 482; Attorney-General *v.* Boston, 123 Mass. 460, 477).

But upon the facts found and admitted no sufficient case is made for a writ of *mandamus*, even if the court could, under any circumstances, issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent charged against the defendant in the petition is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima City and at North Yakima; there are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco Junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima City would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict; and, before judgment in the district court, the legislature, recognizing that the public interest required it, made North Yakima the county seat. The question whether a *mandamus* should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in Railway Co. *v.* Queen, already cited, "there is a very great difference between an indictment for not

fulfilling a public duty, and a *mandamus* commanding the party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. T. & P. Railway *v.* Marshall, 136 U. S. 393.

For the reasons above stated, the judgment of the Supreme Court of the territory must be reversed, and the case remanded, with directions to enter judgment for the defendant, dismissing the petition; and, Washington having been admitted into the Union as a state by Act of Congress passed while this writ of error was pending in this court, the mandate will be directed as the nature of the case requires, to the Supreme Court of the state of Washington. Act Feb. 22, 1889, c. 180, §§ 22, 23 (25 St. 682, 683).

Judgment reversed, and mandate accordingly.

Mr. Justice Brewer (with whom concurred Mr. Justice Field and Mr. Justice Harlan), dissenting.

CONCORD AND MONTREAL RAILROAD *v.* BOSTON AND MAINE RAILROAD.

Supreme Court of New Hampshire, 1893.

[67 *N. H.* 465.]

Petition, for the location of a union station at Manchester. All the parties desire the erection of such a station, which, it is conceded, the public good requires; but they are unable to agree upon a location. The defendants claim that the court has no jurisdiction.

Per Curiam. The legislature has not authorized the railroad commissioners to locate railroad stations (P. S., c. 155, §§ 11–23, c. 159, §§ 21, 22), and no other tribunal is directly invested with that power. It is conceded that the public good requires that there should be a union passenger station in the city of Manchester, to be used by the railroads connecting at that point, for the accommodation of the public as well as for their own convenience and advantage. From this concession it necessarily follows that it is the legal duty of the parties to locate, erect, and maintain such a depot as public necessity requires. The fact that they are unable to agree upon a suitable location does not relieve them from that duty; and the question is, whether this obligation is an unenforceable one in the absence of express legislation upon the subject, or whether the right, which each has in the performance of its public function, to locate a union station at a reasonably convenient point cannot be vindicated and enforced by the orders and decrees of this court.

The right of these parties and the public to have the union sta-

tion at Manchester located in the proper place is a legal right, the enforcement of which is not prevented by the circumstance that the remedial power is not conferred upon a tribunal of special and limited jurisdiction. It is a right which can be judicially determined at the trial term upon a petition or bill in equity seeking such relief. The procedure will be such as is considered most appropriate for the work to be done. Walker *v.* Walker, 63 N. H. 321.

Case discharged.[1]

JONES *v.* NEWPORT NEWS & MISSISSIPPI VALLEY CO.

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1895.

[65 *Fed.* 736.[2]]

ACTION by H. M. Jones against the Newport News & Mississippi Valley Company for injury to and discontinuance of a railroad switch to plaintiff's warehouse. A demurrer was sustained to that part of the petition which claimed damages for discontinuance of the switch, and plaintiff brings error.

TAFT, Circuit Judge. Plaintiff bases his claim for damages — First, on the violation of an alleged common-law duty; and, second, on the breach of a contract.

1. The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer.

In Northern Pac. Ry. Co. *v.* Washington, 142 U. S. 492, it was held that a *mandamus* would not lie to compel a railroad company to establish a station and stop its trains at a town at which for a time it did stop its trains and deliver its freight.

In Com. *v.* Fitchburg R. Co., 12 Gray, 180, it was attempted to compel a railroad company to run regular passenger trains over cer-

[1] *Compare:* R. R. *v.* Commissioners, 6 Q. B. D. 586; P. *v.* R. R., 120 Ill. 48; Commissioners *v.* R. R., 63 Me. 273; P. *v.* R. R., 104 N. Y. 58. — ED.

[2] This case is abridged. — ED.

tain branch lines upon which they had been run for a long time, but had been discontinued because they were unremunerative. The court held that *mandamus* would not lie because the maintenance of such facilities was left to the discretion of the directors.[1]

It is true that the foregoing were cases of *mandamus*, and that the court exercises a discretion in the issuance of that writ which cannot enter into its judgment in an action for damages for a breach of duty. But the cases show that the reason why the writ cannot go is because there is no legal right of the public at common law to have a station established at any particular place along the line, or to object to a discontinuance of a station after its establishment. They make it clear that the directors have a discretion in the interest of the public and the company to decide where stations shall be, and where they shall remain, and that this discretion cannot be controlled in the absence of statutory provision. Such uncontrollable discretion is utterly inconsistent with the existence of a legal duty to maintain a station at a particular place, a breach of which can give an action for damages. If the directors have a discretion to establish and discontinue public stations, *a fortiori* have they the right to discontinue switch connections to private warehouses. The switch connection and transportation over it may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does so or not. At one time in the life of the company, it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. Railroad Co. *v.* Suffern, 129 Ill. 274. But this is very far from holding that there is any common-law liability to maintain a side track forever

[1] An extract from the opinion in Ry. *v.* Washington is omitted. The Court also cited Peo. *v.* N. Y. L. E. & W. R. R., 104 N. Y. 58; Florida, C. & P. R. R. *v.* State, 31 Fla. 482. — Ed.

after it has once been established. The other Illinois cases (Vincent *v.* Railroad Co., 49 Ill. 33; Chicago & N. W. Ry. Co. *v.* People, 56 Ill. 365) may be distinguished in the same way. They depended on statutory obligations, and were not based upon the common law, though there are some remarks in the nature of *obiter dicta* which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice GRAY'S opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

In Barre R. Co. *v.* Montpelier & W. R. Co., 61 Vt. 1, the question was one of condemnation. The law forbade one railroad company to condemn the line of another road, and the question was whether the side tracks of the railroad company, which, with the consent of the owners of the granite quarry, ran into a quarry in which a great business was done, were the line of the railroad within the meaning of the statute. It was held that they were so far as to impose obligations on and create exemptions in favor of the railroad company operating the side tracks. We may concede, for the purpose of this case, without deciding, that, as long as a railroad company permits a side track to be connected with its main line for the purpose of delivering merchandise in car-load lots to the owner of the side track, the obligation of the railroad company is the same as if it were delivering these cars at its own warehouse, on its own side track. But this we do not conceive to be inconsistent with the right of the directors of the railroad company, exercising their discretion in the conduct of the business of the company for the benefit of the public and the shareholders, to remove a side-track connection.

The recital of the facts in the petition in this case is enough to show that the switch connection of the plaintiff was one of probable or possible danger to the public using the railroad, and to justify its termination for that reason. It was made on a high fill, on the approach to a bridge across a stream, and the switch track ran on to a trestle 15 feet above the ground, and terminating in the air. Even if the discretion reposed in the directors to determine where switch connections shall be made or removed were one for the abuse of which an action for damages would lie, the petition would be defective, because it does not attempt in any way to negative the dangerous character of the switch which the facts stated certainly suggest as a good ground for the action of the company complained of. . . .

The judgment of the circuit court is affirmed, with costs.

CHICAGO AND NORTHWESTERN RAILROAD *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1870.

[56 *Ill.* 365.]

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows:

The company has freight and passenger depots on the west side of the north branch of the Chicago River, north of Kinzie Street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukie divisions of the road, running in a northwesterly direction. It also has depots on the east side of the north branch, for the use of the Galena division, running westerly. It has also a depot on the south branch near Sixteenth Street, which it reaches by a track diverging from the Galena line on the west side of the city. The map indicates a line running north from Sixteenth Street the entire length of West Water Street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren Street.

Under an ordinance of the city, passed August 10, 1858, the Pittsburgh, Fort Wayne, and Chicago Company, and the Chicago, St. Paul, and Fond Du Lac Company (now merged in the Chicago and Northwestern Company) constructed a track on West Water Street, from Van Buren Street north to Kinzie Street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne, and Chicago Company laid the track from Van Buren to Randolph Street, and the Chicago, St. Paul, and Fond Du Lac Company, that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the precise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren Street to Kinzie, and do in fact use it in common. The elevator of the relators is situated south of Randolph Street, and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh Company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since the 10th of August, 1866, the Chicago and Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators, known as the Galena, Northwestern, Munn & Scott, Union, City, Munger and Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk, if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie Street; the Munn & Scott on West Water Street, between the elevator of relators and Kinzie Street; the Union and City near Sixteenth Street, and approached only by the track diverging from the Galena division, on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago River. The Munn & Scott elevator can be reached only by the line laid on West Water Street, under the city ordinance already mentioned; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water Street at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ, that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a drawbridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukie division of respondent's road, thence taken to the track on West Water Street, and the cars, when unloaded, could only be taken back to the Galena division by a similar, but reversed, process, thus necessitating the passage of the drawbridge, with only a single line, four times, and, as averred in the return subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it cannot be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water Street freight coming over that division of the road. The doctrine of the Vincent Case, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been reaffirmed in an opinion filed at the present term, in the case of The People ex rel. Hempstead *v.* The Chi. & Alton R. R. Company, 55 Ill. 95, but in the last case we have

also held that a railway company cannot be compelled to deliver beyond its own line simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukie divisions, running northwest, and the Galena division, running west, though belonging to the same corporation and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water Street seems to have been laid for the convenience of the Wisconsin and Milwaukie divisions. It would be a harsh and unreasonable application of the rule announced in the Vincent Case, and a great extension of the rule beyond anything said in that case, if we were to hold that these relators could compel the company to deliver at their elevator grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company and a great derangement of its general business, and though the track on West Water Street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain, the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator and the Wisconsin and Milwaukie divisions of respondent's road, we find a very different state of facts. The track on West Water Street is a direct continuation of the line of the Wisconsin and Milwaukie division; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits in explicit terms, that it has an equal interest with the Pittsburgh, Fort Wayne, and Chicago Railroad in the track laid in West Water Street. It also admits its use; and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukie divisions, is, that those divisions connect with the line on West Water Street only by a single track, and that respondent cannot deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the

use of motive power, labor, and cars, while the latter are being taken to their place of destination and unloaded, is precisely the expense for which the company is paid its freight. It has construeted this line on West Water Street, in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident, from the diagrams attached to the record, that three of the elevators, to which the respondent delivers grain, are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage by the fact that they can be reached only by crossing the river.

We presume, however, from the argument that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukie divisions are concerned. They rest the defence on the contracts made between the company and the elevators above named, for exclusive delivery to the latter to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator, upon its lines and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the Supreme Court of the United States, and the Supreme Court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said that "a common carrier is in the exercise of a sort of public office." N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 381; Sanford *v.* Railroad Co., 24 Pa. 380. If the language is not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord Holt, in Coggs *v.* Bernard, 2 Lord Raymond, 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel that railway companies are

common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power they take the lands of the citizen against his will, and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit, and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying or intimating that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit,

without reference to the pecuniary welfare of the company itself. We hold simply that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary powers is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in the Vincent Case, in 49 Ill., and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of this court under the new constitution, the court as now constituted has re-examined that decision, and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukie divisions of respondent's road. The only difference between this and the Vincent Case is in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the State.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a

principle, and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouses is a deliberate policy, to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it cannot be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling force. Admit, if the respondent were a private association, which had established a line of wagons, for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago, to whom it might be sent and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and nowhere else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is

preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we cannot suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of The City of Chicago *v.* Rumpff, 45 Ill. 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretence of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. Marriot *v.* L. & S. W. R. R. Co., 1 C. B. (N. S.), 498.

In Gaston *v.* Bristol & Exeter Railroad Company, 6 C. B. (N. S.) 641, it was held, that a contract with certain ironmongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In Crouch *v.* The L. & N. W. R. Co., 14 C. B. 254, it was held a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In Sandford *v.* Railroad Company, 24 Pa. 382, the court held that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say, "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to Rogers' Locomotive Works *v.* Erie R. R. Co., 5 Green, 380, and State *v.* Hartford & N. H. R. Co., 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road, as well as to the Wisconsin and Milwaukie divisions. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion. *Judgment reversed.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* CENTRAL STOCKYARDS COMPANY.

SUPREME COURT OF THE UNITED STATES, 1909.

[212 *U. S.* 132.[1]]

THE facts are stated in the opinion. Mr. Justice HOLMES delivered the opinion of the court.

It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulation for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal, undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. See Security Trust & Safety Vault Co. *v.* Lexington, 203 U. S. 323, 333; Roller *v.* Holly, 176 U. S. 398, 409; Connecticut River R. R. Co. *v.* County Commissioners, 127 Massachusetts, 50, 57; Ash *v.* Cummings, 50 N. H. 591; Moody *v.* Jacksonville, Tampa & Key West R. R. Co., 20 Florida, 597; *Ex parte* Martin, 13 Arkansas, 198; St. Louis *v.* Hill, 116 Missouri, 527. It follows that the requirement of the state constitution cannot stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall. We do not mean, however, that the silence of the constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state constitution by the state court. We should add that the requirement in the first part of the judgment, which we have been discussing, is open to the objections mentioned in the former decision so far as it practically requires the Louisville and Nashville Railroad to deliver cars at Louisville elsewhere than at its own terminus. 192 U. S. 570, 571.

[1] Only one point is printed. — ED.

MAYS v. SEABOARD AIR LINE RAILWAY.

SUPREME COURT OF SOUTH CAROLINA, 1906.

[75 S. C. 455.[1]]

MR. CHIEF JUSTICE POPE. Thus, we see both by the Federal and State Constitutions that full protection is herein provided against any infraction of the rights of citizens. This should be so. Any disregard of these constitutional provisions aims a death blow at the preservation of private rights, and it falls to the lot of the courts to uphold and protect these provisions of law. A corporation in the eyes of the law is a private individual so far as property rights are concerned. In this instance, the defendant railroad has already had measured to it under the law its right to maintain its property rights in its tracks, in its engines and other property, and its franchises laid out and measured and admitted. By this act of the Legislature it is sought to confer upon a private individual the right, within the distance of one-half mile, to require this railway company to connect its railway track with a private brick mill against the railway company's consent. It is required by this act that the railroad shall lay out a track from its line of railway to the brick mill of the plaintiff. It is true, that the act provides that the plaintiff shall pay the costs of trackage, but this, every dollar of it, must be returned by the railroad to the owner of the brick mill in instalments of twenty per cent. each for five successive years, thus taking from the railroad's pocket money which it has already earned. If this is not an infraction of law, what is it? Thus it violates the requirements of our Federal and State Constitutions. While the Legislature is empowered to alter or amend the charter of the defendant, it is imperative upon it to respect the property of defendant under the guarantees of the Constitution in so doing. Subdivision (a), therefore, must be overruled.

[1] The principal point is printed. — ED.

RALSTON BUSINESS MEN'S ASSOCIATION *v.* BUSH.

SUPREME COURT OF NEBRASKA, 1918.

[167 *Northwestern Reporter*, 727.]

ROSE, J. The Nebraska State Railway Commission ordered defendant to provide at the village of Ralston a station and other shipping facilities near the intersection of Seventy-Seventh street and the Missouri Pacific Railway track. The case is presented here upon an appeal by defendant.

Three-fourths of a mile from the industrial part of Ralston defendant has a building and a team track. The Chicago, Burlington & Quincy Railroad Company has a station at the village itself, where three employés are engaged in the railway service. The sufficiency of existing shipping facilities and the necessity for improvements were controverted issues.

On appeal the decision of the Nebraska State Railway Commission is challenged as unreasonable. The order was made before the United States engaged in the present war. As a military measure the federal government is now controlling defendant's railway system. The enforcement of the order challenged on appeal will require labor, materials, and money. Owing to the exigencies of war, the government is making extraordinary demands for funds, men, materials, and railroad equipment. Defendant's lines of railroad transportation are connecting links between a granary of the nation and millions of men now engaged in the common defence. In this emergency the general welfare should be considered in adjusting between private suitors controversies involving expenditures for the improvement of local railroad facilities. When the order was made there was no occasion or opportunity to present or consider these features of the questions presented by the appeal. The new situation grew out of facts requiring the judicial notice of the appellate court. The Nebraska State Railway Commission should have an opportunity for further inquiry in view of changed conditions. To that end, following Marshall *v.* Bush, 102 Neb. ——, 167 N. W. 59, the order challenged by defendant is vacated, and the proceeding remanded to the Nebraska State Railway Commission for further consideration.

Reversed and remanded.

LETTON, J., not sitting.

PENNSYLVANIA RAILROAD COMPANY *v.* SONMAN SHAFT COAL COMPANY.

SUPREME COURT OF THE UNITED STATES, 1916.

[242 *U. S.* 120.[1]]

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Upon the trial the carrier offered to prove by a witness then under examination . . . "that during all of the period of this action the defendant had in effect . . . through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive."

But on the coal company's objection the evidence was excluded. We think the ruling was right. The offer did not point to any unusual or abnormal condition, not reasonably to have been foreseen, but, on the contrary, to a situation which was described as continuous throughout the four year period to which the action relates. It did not indicate that this condition was even peculiar to that period, or was caused by an extraordinary volume of coal traffic or an unusual detention of cars on other lines of railroad, or that it was other than a normal incident of the coal transportation in which the carrier was engaged. Without doubt the cars of this carrier when loaded with coal often went forward to destinations on the lines of other carriers. It is common knowledge that coal transportation has been conducted quite generally in this way for many years. Besides, a carrier extensively engaged in such transportation from mines along its lines, as this one was, naturally would expect to have a considerable number of cars on other lines in the ordinary course of business.

Judgment affirmed.

[1] Part of the opinion dealing with another question is omitted. — ED.

LOS ANGELES SWITCHING CASE.

SUPREME COURT OF THE UNITED STATES, 1914.

[234 *U. S.* 294.[1]]

MR. JUSTICE HUGHES delivered the opinion of the court.

On the other hand, it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute. It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which also various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system. It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question 'as portions of their terminals, making no extra charge for service thereto when the carrier receives the benefit of the line haul out or in.' It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

[1] Only one point is printed. — ED.

TAP LINE CASES.

Supreme Court of the United States, 1914.

[234 *U. S.* 1.[1]]

Mr. Justice Day delivered the opinion of the court.

As we have said, the Commission by its order herein required the trunk lines to reëstablish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves.

Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does.

For the reasons stated, we think the Commerce Court did not err in reaching its conclusion and decision, and its judgment is

Affirmed.

[1] Only the conclusion of the opinion is printed. — Ed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. *v.* MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION.

SUPREME COURT OF THE UNITED STATES, 1918.

[247 *U. S.* 490.[1]]

MR. JUSTICE CLARKE delivered the opinion of the court.

Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies. The order of the Commission affirmed by the Supreme Court of Minnesota, so far from being arbitrary, is plainly just, and clearly it does not deprive the plaintiffs in error of their property without compensation or without due process of law, by requiring, as it does, that for ratemaking purposes the Milwaukee and Omaha companies shall extend to shippers over their tracks the legal title to which is in the Eastern Company, equality of treatment with that which they give to shippers over their separately owned tracks, where similar service is rendered.

The claim that an unlawful burden is imposed upon interstate commerce by requiring that the one delivery track here involved shall be treated with respect to intrastate traffic precisely as many other similarly used and situated tracks have always been treated by the owning companies is too unsound to merit consideration.

The judgment of the Supreme Court of Minnesota is

Affirmed.

[1] The statement of facts in the opinion is omitted. — ED.

COVINGTON STOCK-YARDS COMPANY *v.* KEITH.

SUPREME COURT OF THE UNITED STATES, 1891.

[139 *U. S.* 128.]

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 28th of January, 1886, George T. Bliss and Isaac E. Gates instituted in the court below a suit in equity against the Kentucky Central Railroad Company, a corporation of Kentucky, for the foreclosure of a mortgage or deed of trust given to secure the payment of bonds of that company for a large amount; in which suit a receiver was appointed who took possession of the railroad, with authority to operate it until the further order of the court.

The present proceeding was begun on the 18th of June, 1886, by a petition filed in the foreclosure suit by Charles W. Keith, who was engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the city of Covington, Kentucky, over the Kentucky Central Railroad. The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith by the receiver acting under and pursuant to a written agreement made November 19, 1881, between the railroad company and the Covington Stock-Yards Company, a corporation created under the general laws of Kentucky; the yards of the latter company located in Covington, and connected with the railroad tracks in that city, being the only depot of the railway company that was provided with the necessary platforms and chutes for receiving or discharging live stock on and from its trains at that city. The petition alleged that Keith was the proprietor of certain live-stock lots and yards in that city immediately west of those belonging to the Covington Stock-Yards Company, and separated from them by only one street sixty feet in width; that he was provided with all the necessary means of receiving, feeding, and caring for such stock as he purchased, or as might be consigned to him by others for sale; and that his lots and yards were used for that purpose subsequently to March 1, 1886, and until, by the direction of the receiver, the platforms connecting them with the railroad were torn up and rendered unfit for use. The prayer of the petitioner was for a rule against the receiver to show cause why he should not deliver to him at some convenient and suitable place outside of the lots or yards of the said Covington Stock-Yards Company free from other than the customary freight charges for transportation, all stock owned by or consigned to him and brought over said road to Covington.

The receiver filed a response to the rule, and an order was entered giving leave to the Covington Stock-Yards Company to file an intervening petition against the railroad company and Keith, and requiring the latter parties to litigate between themselves the question of the

validity of the above agreement of 1881. The Stock-Yards Company filed such a petition, claiming all the rights granted by the agreement referred to, and alleging that it had expended sixty thousand dollars in constructing depots, platforms, and chutes, as required by that agreement.

Referring to that agreement it appears that the Stock-Yards Company stipulated that its yards on the line of the railroad in Covington should be maintained in good order, properly equipped with suitable fencing, feeding-pens, and other customary conveniences for handling and caring for live stock, and to that end it would keep at hand a sufficient number of skilled workmen to perform the operations required of it, and generally to do such labor as is usually provided for in stock yards of the best class, namely, to load and unload and care for "in the best manner all live stock delivered to them by the party of the first part [the railroad company] at their own risk of damage while so doing, and in no event to charge more than sixty cents per car of full loads for loading and sixty cents per car for unloading, and no charges to be made for handling less than full loads, as per way-bills." The Stock-Yards Company also agreed to become liable for those charges, and to collect and pay over to the railroad company, as demanded from time to time, such money as came into its hands, the charges for feeding and caring for live stock not to be more than was charged for similar services and supplies at other stock yards of the country. The railroad company, upon its part, agreed to pay the Stock-Yards Company the above sums for loading and unloading and otherwise acting as its agent in the collection of freights and charges upon such business as was turned over to it by the railroad company; that it would require all cars loaded at yards for shipment South or East to be carefully bedded, which the Stock-Yards Company was to do at the rates usually charged in other yards; that it would make the yards of the Stock-Yards Company its "depot for delivery of all its live stock," during the term of the contract, and not build, "nor allow to be built, on its right of way, any other depot or yards for the reception of live stock." The delivery of stock in cars on switches or sidings provided for the purpose was to be considered a delivery of the stock to the Stock-Yards Company, which, from that time, was to be responsible for the stock to the railroad company. To protect the business of the Stock-Yards Company from damage in case the railroad extended its track over the Ohio River, the railroad company agreed that during the term of the contract the rate of freight from all points on its road and connections should "not be less than five dollars per car more to the Union Yards of Cincinnati than the rate to Covington yards from the same points;" that its business arrangements with any other railroad or transportation line should be subject to this agreement; and that the yards of the Stock-Yards Company "shall be the depot for all live stock received from its connections for Cincinnati or Eastern markets." The agreement by its terms was to remain in force for fifteen years.

In the progress of the cause E. W. Wilson, by consent of parties, was made a co-petitioner and co-respondent with Keith.

By the final decree it was found, ordered, and decreed as follows: "It is the duty and legal obligation of the Kentucky Central Railroad Company, as a common carrier of live stock, to provide suitable and convenient means and facilities for receiving on board its cars all live stock offered for shipment over its road and its connections from the city of Covington, and for the discharge from its cars of all live stock brought over its road to the said city of Covington, free of any charge other than the customary transportation charges to consignors or consignees; and that the said petitioners, Keith and Wilson, live-stock dealers and brokers, doing business at the city of Covington, and proprietors of the Banner Stock-Yards at that place, are entitled to so ship and receive over said road such live stock without being subject to any such additional charges imposed by said receiver, said railroad company, or other person or corporation. The court further finds and decrees that the alleged contract entered into by and between the said railroad company and the said Covington Stock-Yards Company, of date the 19th day of November, 1881, does not entitle the said Stock-Yards Company to impose upon any shipper of live stock over said road, passing such stock through the yards of said company to and from the cars of said railroad company, any charge whatever for such passage. It is stipulated in said contract that said Stock-Yards Company shall establish and maintain suitable yards or pens for receiving, housing, feeding, and caring for live stock, and to receive all such stock, and load and unload the same upon and from the cars of said company transported on or to be transported over said road for a compensation of sixty cents per car load, to be paid by said railroad company for and during the period of fifteen years from the date of said contract, which has not yet expired, while the said railroad company agreed that it would not during said period establish or allow to be established on the line of its road or on its right of way in said city of Covington any other platform or depot than that of said Stock-Yards Company for the receipt or delivery of such live stock. . . . The court doth further find that the general freight depot of the said railroad company in the said city of Covington, at the terminus of its road between Pike and Eighth Streets, is not a suitable or convenient place for the receipt and delivery of live stock brought to the said city or to be shipped therefrom over said road, and neither said railroad company nor said receiver having provided such suitable depot or place therefor, except the yards of said Stock-Yards Company, it is now ordered and decreed that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson at and through the said Covington stock yards all such live stock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stock yards, in writing, that it may be so done, being filed in this court and cause on or before the 1st day of January next after the

entry of this decree, free of any charge for passing through said yards to and from the cars of said railroad company. In default of such consent being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the live-stock switch of said railroad company north of said stock yards the said railroad company and said receiver shall receive and deliver all such live stock to said Keith & Wilson as shall be consigned to them or either of them or be offered by them or either of them for shipment at said platform. The said Keith & Wilson shall provide an agent or representative at said platform to receive such cattle as they may be notified by said railroad company or said receiver are to be delivered to them thereat, and they shall give the said railroad company or said receiver reasonable notice of any shipment desired to be made by them from said platform to conform to the departure of live-stock trains on said road."

The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But it is contended that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, free from any charge other than the customary one for transportation, for merely passing into and through the yards of the Covington Stock-Yards Company to and from the cars of the railroad company. As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, without danger or inconvenience to the public in the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, that the carrier may, without a special contract for that purpose, require the shipper or consignee, in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.

When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which

the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport, and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

A railroad company, it is true, is not a carrier of live stock with all the responsibilities that attend it as a carrier of goods. North Penn. Railroad *v.* Commercial Bank, 123 U. S. 727, 734. There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. "But," this court said, in the case just cited, "notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced."[1] The same principle necessarily applies to the receiving of live stock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of

[1] Myrick *v.* Michigan Central Railroad, 107 U. S. 102, 107; Hall & Co. *v.* Renfro, 3 Met. (Ky.) 51, 54; Mynard *v.* Syracuse & Binghamton Railroad, 71 N. Y. 180; Smith *v.* New Haven & Northampton Railroad, 12 Allen, 531, 533; Kimball *v.* Rutland & Burlington Railroad, 26 Vt. 247; South & North Alabama Railroad Company *v.* Henlein, 52 Ala. 606, 613; Wilson *v.* Hamilton, 4 Ohio St. 722, 740; Ayres *v.* Chicago & Northwestern Railroad, 71 Wis. 372, 379, 381; McCoy *v.* K. & D. M. R. Co., 44 Iowa, 424, 426; Maslin *v.* B. & O. R. R. Co., 14 W. Va. 180, 188; St. Louis & Southeastern Railway *v.* Dorman, 72 Ill. 504; Moulton *v.* St. Paul, Minneapolis, &c. Railway, 31 Minn. 85, 87; Kansas Pacific Railway *v.* Nichols, 9 Kas. 235, 248; Clarke *v.* Rochester & Syracuse Railroad, 14 N. Y. 570, 573; Palmer *v.* Grand Junction Railway, 4 M. & W. 749.

its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellee had been permitted to use them, without extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation.

Decree affirmed.

MICHIGAN CENTRAL RAILROAD COMPANY *v.* MICHIGAN RAILROAD COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1915.

[236 *U. S.* 615.[1]]

MR. JUSTICE PITNEY delivered the opinion of the court.

It is said the statute as construed and enforced by the Commission and the Supreme Court is repugnant to the "due process" clause because it in effect requires a delivery by the Michigan Central at points off its own lines. By its terms, however, the order does not require the Michigan Central to haul the cars to points on the Detroit United, but only to permit them to be hauled by the latter company. At common law a carrier was not bound to carry except on its own line, and probably not required to permit its equipment to be hauled off the line by other carriers. A., T. & S. F. R. R. *v.* D. & N. O. R. R., 110 U. S. 667, 680; Kentucky &c. Bridge Co. *v.* Louis. & Nash. R. R., 37 Fed. Rep. 567, 620; Oregon Short Line *v.* Northern Pacific Ry., 51 Fed. Rep. 465, 472, 475; affirmed, 61 Fed. Rep. 158. But in this, as in other respects, the common law is subject to change by legislation; and, so long as the reasonable bounds of regulation in the public interest are not thereby transcended, the carrier's property cannot be deemed to be "taken" in the constitutional sense. Minn. & St. Louis R. R. *v.* Minnesota, 193 U. S. 53, 63; Atlantic Coast Line *v.* N. Car. Corp. Com'n, 206 U. S. 1, 19; Grand Trunk Ry. *v.* Michigan Ry. Com., 231 U. S. 457, 470; Wisconsin &c. R. R. *v.* Jacobson, *supra;* Chi., Mil. & St. P. Ry. *v.* Iowa, *supra.*

The insistence that the property of plaintiff in error in its cars is taken by the order requiring it to deliver them to the Detroit United Railway involves, as we think, a fundamental error, in that it overlooks the fact that the vehicles of transportation, like the railroad upon which they run, although acquired through the expenditure of private capital, are devoted to a public use, and thereby are subjected to the reasonable exercise of the power of the State to regulate that use, so far at least as intrastate commerce is concerned. Munn *v.* Illinois, 94 U. S. 113. That it is not as a rule unreasonable to require such interchange of cars sufficiently appears from the universality of the practice, which became prevalent before it was made compulsory, and may be considered as matter of common knowledge, inasmuch as a freight train made up wholly of the cars of a single railroad is, in these days, a rarity. In Michigan, car interchange has long been a

[1] Part of the opinion is omitted. — ED.

statutory duty. Mich. Gen. Acts 1873, No. 79, § 15, p. 99; No. 198, § 28, p. 521; Michigan Central R. R. v. Smithson, 45 Michigan, 212, 221. And see Peoria & P. U. Ry. v. Chicago, R. I. & P. Ry., 109 Illinois, 135, 139; Burlington &c. Ry. v. Dey, 82 Iowa, 312, 335; State v. Chicago &c. Ry., 152 Iowa, 317, 322; affirmed, 233 U. S. 334; Pittsburgh &c. Ry. v. R. R. Commission, 171 Indiana, 189, 201; Jacobson v. Wisconsin &c. R. R., 71 Minnesota, 519, 531; affirmed, 179 U. S. 287.

To speak of the order as requiring the cars of plaintiff in error to be delivered to the Detroit United "for the use of that company" involves a fallacy. The order is designed for the benefit of the public having occasion to employ the connecting lines in through transportation. The Detroit United, like the Michigan Central, acts in the matter as a public agency.

The contention that no provision is made for the paramount needs of plaintiff in error for the use of its own equipment, nor for the prompt return or adjustment for loss or damage to such equipment, nor for compensation for the use thereof, is not substantial. The order is to receive a reasonable interpretation, and according to its own recitals is to be read in the light of the opinion of the Commission, which shows that it is not intended to have an effect inconsistent with the other operations of the company. It was expressly found that there was no special ground for apprehending loss or damage to the equipment. Certainly the order does not exclude the ordinary remedies for delay in returning cars or for loss or damage to them. Nor does it contemplate that plaintiff in error shall be required to permit the use of its cars (or of the cars of other carriers for which it is responsible) off its line without compensation. The state court expressly held that section 7, *c*, provides for reasonable compensation to the carrier whose cars are used in the interchange. The finding of the Commission, approved by the court, was that the Michigan Central would merely have to expend its proportion of the amount necessary to install the connection between the two roads, and would be called upon for no further expenditure in the premises, and that the business to be derived by it from Ortonville, Goodrich, and the surrounding country via the Detroit United Railway, promised to be considerable in amount, and thereby the Michigan Central would be a beneficiary from the proposed connection and interchange. It was, we think, permissible for the court to find, as in effect it did find, that the benefits thus derived would include compensation for the use of the cars of the Michigan Central for purposes of loading and delivery along the line of the Detroit United. We are unable to see that any question as to the adequacy of the compensation was raised in the state court.

Plaintiff in error relies upon Central Stock Yards v. Louis. & Nash.

R. R., 192 U. S. 568, and Louis. & Nash. R. R. *v.* Stock Yards Co., 212 U. S. 132. The former of these was an action in the federal court and came here by appeal from the Circuit Court of Appeals. This court held as a matter of construction that the constitution of Kentucky did not require that the railroad company should deliver its own cars to another road. The second case was a review of the judgment of the court of last resort of the State. That court having held that the state constitution did require the carrier to deliver its own cars to the connecting road, it was contended that this requirement was void under the Fourteenth Amendment as an unlawful taking of property. This court said (212 U. S. 143): "In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. . . . We do not mean, however, that the silence of the constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state constitution by the state court." The case now before us is plainly distinguishable, as appears from what we have said. And, upon the whole, we see no sufficient ground for denouncing the regulation in question as either arbitrary or unreasonable.

CHAPTER VI.

REGULATION OF THE SERVICE.

PENNSYLVANIA COAL CO. *v.* DELAWARE AND HUDSON CANAL CO.

COURT OF APPEALS, NEW YORK, 1865.

[31 *N. Y.* 91.]

DAVIES, J. The defendant is the owner of a canal extending from tide water on the Hudson River, to the interior of the State of Pennsylvania. The plaintiff is the owner of extensive coal mines, bordering on the defendant's canal, which it mines for transportation to market. For such purpose, it is the owner of a large number of canal boats navigating the defendant's canal. By an agreement or deed, made and entered into between the parties to this action, dated 29th July, 1851, the defendant covenanted and agreed with the plaintiff, to furnish to any and all boats owned or used by the plaintiff for the purpose of transporting coal entering the said canal, by railroad connecting with the said canal, at or near the mouth of the Wallenpaupack River, or containing coal, entering as aforesaid, belonging to or transported by or on account of the plaintiff, in which coal, or the transportation thereof, the plaintiff might be in any manner interested, all the facilities of navigation and transportation which the said canal should furnish, when in good, navigable condition and repair, to boats used by any other company or person, or belonging to or used by or containing coal transported by or for or on account of the defendant. The plaintiff alleged a breach of said contract or agreement in this, that the number of boats employed by the plaintiff in the transportation of coal upon said canal, was greater than the number employed by the defendant therein, and that the boats of the plaintiff, and those employed by it, made their trips in much shorter time than the boats of the defendant, and therefore the act of the defendant in neglecting and refusing to pass the boats of the plaintiff through the locks on said canal in the order in which they arrived at the locks respectively, but delaying them

until one of the boats of the defendant, or of some individual, arriving after the plaintiff's boat at such lock, had been passed, was highly injurious and of great detriment to the plaintiff. The plaintiff prays judgment, that the defendant may be decreed and adjudged to use and manage said canal and the locks thereon, in such manner as not to impede, hinder, or delay the boats of the plaintiff navigating the said canal, and used for the purpose of transporting coal entering said canal at or near the mouth of the Wallenpaupack River, or containing coal, and entering as aforesaid, belonging to or transported by or on account of the plaintiff, and may be restrained from giving the preference of passage through any lock thereon to some other boat than the plaintiff's, although the latter arrived first at such lock, and that the defendant might be decreed specifically to perform its said agreement with the plaintiff.

The case was tried by the court without a jury, and the court found as matter of fact, that the plaintiff had not proven a breach of the contract, and the court thereupon gave judgment for the defendant, denying the relief asked for, and denying the injunction prayed for and dismissing the complaint with costs. The General Term, on appeal, affirmed this judgment, and the plaintiff now appeals to this court.

The only ground upon which the plaintiff could invoke the aid of a court of equity to decree a specific performance of the contract, and to restrain the defendant from its violation, was that there had been a breach of the contract and a violation, or a threatened violation of it. This was the foundation of the plaintiff's edifice, the corner stone upon which it rested. The finding by the court, that no breach or violation of the contract had been proven, entirely demolishes all claim of the plaintiff to any equitable relief. No threatened violation of the contract is alleged or pretended, and it follows that the judgment of the Supreme Court on this state of facts was correct, and the same should be affirmed.

MULLIN, J. Two questions only are presented for consideration on this appeal. These are: 1st. Whether the contract between the parties had been violated. And if it has, then, 2d. Are the plaintiffs entitled to a specific performance of the contract.

1. Have the defendants broken the contract?

The defendants obligated themselves by the agreement to furnish to the plaintiffs' boats all the facilities of navigation and transportation which their canal should afford, when in good and navigable condition and repair, to boats owned or used by any other company or person, or owned or used by the defendants for the transportation of coal.

The contract, it will be perceived, is not, as the plaintiffs' counsel seems to construe it, that the defendants will afford to the plaintiffs' boats all the facilities of navigation that the canal, when in good order, shall afford, but it is to furnish all the facilities to the plaintiffs that the canal, when in good order, shall afford to any other person's or company's boats, including defendants' own boats.

Before the plaintiffs can insist that the contract has been violated as to its boats, they were bound to show what facilities were afforded by the canal, when in good order, to other boats. No difference is shown to have been made between the plaintiffs' boats and those of other owners, in the facilities extended in the business of navigating the canal.

The defendants, as owners, had the right to prescribe such reasonable rules and regulations for the government of vessels passing along their canal, as their directors deemed best calculated to promote their own interests and the interests of those engaged in navigating the canal. Such regulations must embrace the order in which boats should pass through the locks. Such regulations, while resting largely in the discretion of the officers of the company, must, nevertheless, be reasonable. Now, it appears that all boats passing to the Hudson River, were locked through the Eddyville lock in the order of their arrival at such lock. This regulation is not complained of; but it is insisted that the same rule should be observed in locking up through the same lock the empty boats, and that the omission to do so is a breach of the agreement. It is claimed that the detention of plaintiffs' boats, if they first arrive at the lock, until boats of the defendants, subsequently arriving, are locked through alternately with plaintiffs', causes unreasonable delay, and is an unjust detention of the plaintiffs' boats.

When the plaintiffs' boats arrive at the lock first, it does seem to be oppressive to require any of them to be delayed until the boats of other persons, subsequently arriving, are locked through. But it must sometimes happen that the defendants' boats arrive first, and if they are delayed until the plaintiffs' boats, subsequently arriving, have been passed through, the plaintiffs have the benefit of the same rule which operated injuriously when their boats were first at the lock. While the rule is uniformly and impartially applied, it is difficult to see how it operates to the prejudice of the plaintiffs rather than to that of all others navigating the canal. While it is true that the plaintiffs owned the largest number of boats, it does not follow, nor is it proved, that their boats are uniformly first at the lock on their way back to the mines. If they are not, then they must take the delay imposed upon them by the regulation in compensation for the benefit derived from passing alternately with boats arriving at the lock before those of the plaintiffs.

It does not appear that the regulation complained of was a new one. It may have been, and in the absence of both allegation and proof to the contrary, I think we are bound to presume that it had been in force from the making of the contract; and if so — if the plaintiffs had acquiesced in it for so long a time — it is somewhat late to complain of it.

If the regulation was designed to embarrass the plaintiffs, it is difficult to see why it should not have been applied to the boats coming to as well as to those going from the Hudson. There would seem to have

been some reason for the discrimination, but what it is is not disclosed by the case.

A reason is suggested by the respondents' counsel which would seem to account for the regulation, and is probably the true one, and that is, that as but a single boat, or at most but a very limited number of boats is being laden at the same time, by either party, it is no cause of delay that the empty boats arrive one after the other, at intervals of twenty minutes; for if twenty or thirty boats arrive at one time, they must be detained until those ahead are loaded, and the result would be, that while nothing would be gained by the plaintiffs, considerable time would be lost by the other boats compelled to wait until all of plaintiffs' boats had passed through. By the regulation, it would seem that plaintiffs' boats are passed up as fast as they are required to be loaded, and that unnecessary delay to the defendants' boats is avoided.

A preference seems to be given to transient boats over those of either the plaintiffs or defendants. In what business these transient boats were employed, or their number, or who were the owners, does not appear. But it is probable that they were boats engaged in the transportation of property other than coal, and that the number was small compared with the number owned by the plaintiffs or defendants. If these conjectures are correct, they would account for the preference given to such boats in passing the lock. It would be very harsh to require a man, owning a single boat, to be detained until thirty or forty boats, arriving ahead of him, were got through the lock. And, when a preference was given to one such boat, it became necessary to extend it to all, and it does not appear that the preference delayed the loading of any of the plaintiffs' boats. This delay, and not that at the lock, would be the cause of damage of which the plaintiffs could justly complain. If the boats, on arriving at their place of destination, would have been detained as long before being loaded as they lay at the lock, it is not perceived how the plaintiffs could be damnified.

In a word, the regulation is one that the defendants had the right to make; it is not shown to be either unreasonable or unjust, nor that it has been the cause of any real injury to the plaintiffs. It seems to have been acquiesced in for a long time, and no reason is perceived why it should now be repudiated or annulled.[1]

Judgment affirmed.

[1] The learned judge also held that no case had been shown for equitable jurisdiction. — Ed.

PLATT v. LECOCQ.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, 1907.

[158 *Fed.* 723.[1]]

THIS is an appeal from a decree of the court below that an order of the Board of Railroad Commissioners that the United States Express Company receive at its offices in Aberdeen, S. D., from the Aberdeen National Bank, all moneys tendered to it by that bank for carriage on certain trains which leave Aberdeen at 6:30, 7:00, and 7:45 a. m., during all reasonable business hours of the day preceding the departure of these trains, be enforced.

SANBORN, Circuit Judge. The safe-keeping overnight and delivery in the morning before the trains start of the specie and currency which the bank might desire to ship by this express company upon these morning trains will entail no more expense upon the bank than their delivery the day before, while the receipt of them on the latter day and their storage overnight will cause the express company additional expense, and will make its business of handling this money a losing one. The risk of keeping these packages of money overnight is less to the bank than to the express company, because it has a burglar proof vault, and trusty messengers for the purpose of keeping large amounts of money safely, and protecting them against robbers and fire in the city of Aberdeen, while the express company has no such safeguards and facilities in that city, and, finally, the business of the bank is to receive and keep safely for its depositors in the city of Aberdeen, and to send to them and to others who buy or borrow it, the specie or currency deposited with it, and it has a suitable vault and trusty officers and servants to carry on this business and to protect this money. The business of the express company, on the other hand, is to transport money, to keep it safely, and to insure it against loss during its transportation, and for this purpose it has specially constructed stationary safes in cars and trusty messengers to travel with it, but it is no part of its business to store or to keep valuable packages of specie or currency for any length of time greater than is reasonably necessary to conduct its transportation. The trains under consideration do not leave Aberdeen at very early hours in the morning, and it is neither impossible nor impracticable for the bank to deliver its packages of money to the express company in the morning of the day before the trains start. To require the express company to receive these packages on the preceding day, and to store them and to insure their safe-keeping overnight is to transfer to the express company a part of the risk, responsibility, and business of the bank, a part of the safe-keeping of specie and currency in the city of Aberdeen, a part of its business which it has adequate safeguards to conduct, which it undertakes to carry on, and for which it presumably

[1] Only the concluding part of the opinion is printed.—ED.

receives reasonable compensation, while the express company, which has no such facilities, can secure no such compensation, and does not offer or undertake to do any such business. In view of these facts, rules, and considerations, the evidence in this case falls far short of convincing proof that the rules and practice of the express company upon this subject which have been assailed here were unreasonable or unjust. Indeed, in our opinion, it would be far more unreasonable to require the express company to receive these packages of specie and currency for transportation on the morning trains the day before they start, and thereby to compel it to store and insure them overnight, than it would be to refuse so to do, and thus to leave the bank to send them insured by mail at a lower rate, or to deliver them to the express company in the morning before the trains depart.

There is another consideration which leads to the same conclusion. Courts and commissions ought not to interfere with the established rules and practice of transportation companies on account of incidental inconveniences and trivial troubles to which the conduct of all business is necessarily subject. The business of railroad companies and express companies cannot be conducted for the purpose of carrying on the business of their customers exclusively, nor without some discomforts and inconveniences to all parties engaged in any of these occupations. Unless a clear injustice is perpetrated or a substantial injury is inflicted, or there is an imminent threat of them, the annoyances and inconveniences in the transaction of the business of the transportation companies should be left for correction in the pecuniary interests and business instincts of the respective parties concerned, and their laudable anxiety to secure, retain, and increase their business. No injustice has been perpetrated in this case. No serious damage has been, or is likely to be, inflicted upon the bank by the refusal of the express company to receive money until the morning of the day when the trains depart, in view of the pregnant fact that it has elected to cause its incoming currency to be shipped to it by mail for more than a year, and to the amounts of hundreds of thousands of dollars, when it could have caused it to have been sent by this express company. No other shipper is complaining, and the practice of the express company creates no preference or prejudice to party, locality, or description of traffic, while the practice which the bank seeks to enforce will inevitably compel other parties and other descriptions of traffic to bear a part of the burden of storing and keeping overnight the moneys it seeks to send out. There is no equity in this case of the bank, and it is entitled to no relief.[1]

Reversed.

[1] *Compare:* Alsop *v.* Southern Express Company, 104 N. C. 278, *contra.*

POPE *v.* HALL.

SUPREME COURT OF LOUISIANA, 1859.

[14 *La. Ann.* 324.]

MERRICK, C. J. This suit has been brought against Messrs. Hall & Hildreth, the proprietors of the well-known St. Charles Hotel, of this city, to recover of them three hundred and forty-five dollars, for a watch and chain and gold coin, alleged to have been stolen from the trunk of the plaintiff whilst lodging with the defendants as a traveller.

The case was tried without the intervention of a jury, and an elaborate examination of the law and facts by the learned judge of the District Court resulted in a judgment in favor of the plaintiff for $300; defendants have appealed.

At the head of each stairway a large card was posted, cautioning the boarders to beware of hotel thieves, and requesting them to deposit all money, jewelry, watches, plate, or other valuables, in the safe at the office, and notifying the guests that the proprietors would not be responsible for any such articles stolen from the rooms.

The regulations of the hotel were posted in print in each of the rooms. Among other regulations, is stated that "money and articles of value may be deposited and a receipt taken, and no remuneration may be expected if lost when otherwise disposed of."

The defendants contend that the innkeeper has the right to say where the property shall be kept as a sequence of his responsibility; that if he is to be held responsible as a custodian, he must be permitted to guard the property in his own way, and they derive this right to limit the responsibility from the Roman law, and cite the concluding paragraph to law 7. Dig., lib. 4, tit. 9, *De protestatione exercitoris.* It is as follows: —

Item si prædixerit, et unusquisque rectorum res suas servet, neque damnum se præstaturum, et consenserint vectores predictioni, non convenitur.

It will be observed in the text cited, that the master of the ship limits his liability only by the actual consent of the passengers. In the present case, this right is claimed to the innkeeper without such express consent of the traveller.

Without reviewing the cases, or entering into the prolix discussions which this question has given rise to in France, England, and the United States, it is sufficient to say that we think the district judge very correctly took a distinction between articles of value and those ordinarily worn, together with such small sums of money as are usually carried about the person. He says, in conclusion: "They (innkeepers) have no right to require a traveller to deliver up to them his necessary

baggage, his watch, which adorns his person and is a part of his personal apparel, and the money which he has about him for his personal use. Such a regulation is contrary to law and reason. If he had large sums of money or valuables the rules might be different.

Under this view of the case, which we adopt, it is a matter of indifference whether the plaintiff did or did not read the notices posted in the hotel.

The traveller who arrives at the inn where he intends to lodge during the night, ought not to be required to part with his watch which may be necessary to him to regulate his rising, or to know when the time of departure of the morning train or boat has arrived. Neither ought he to be required to deposit with the innkeeper such small sums of money as are usually carried by the majority of persons in the like condition in life visiting such hotel.

The innkeeper should provide safe locks or fastenings to the rooms, and in default of the same, he must be held responsible for the loss of such articles of apparel and small sums of money as are usually carried or worn by the class of persons favoring the hotel with their patronage.

The estimate of the damage sustained by the plaintiff is justified by the proof. *Judgment affirmed.*

VOORHIES, J., absent.

FULLER *v.* COATS.

SUPREME COURT OF OHIO, 1868.

[18 *Oh. St.* 343.]

THE original action was brought by the plaintiff to recover of the defendants the value of an overcoat and articles in the pockets thereof, alleged to have been lost from the hotel of the defendants while the plaintiff was a guest therein. The petition contains the ordinary averments to charge upon the innkeepers a liability for the loss of the goods of their guest.

The answer denies the material averments in the petition; and, by way of defence, alleges that the defendants "had prepared a place in their office for the deposit of overcoats, and other articles of personal apparel not left in the rooms as baggage, and kept there a person to receive such articles and give to the owner a check therefor, and they required guests to so deposit such articles; of all which the plaintiff had notice; that the plaintiff neglected and omitted to leave his overcoat, with its contents, in the custody of defendants, but carelessly and negligently hung the same up in the open hall of the inn without any notice to the defendants, and without any knowledge on their part that he had so negligently exposed the same; and that while so carelessly exposed by the plaintiff, said overcoat was, without the knowledge or

fault of the defendants, stolen, as they suppose. And so the defendants say that said overcoat was lost through and by reason of carelessness and negligence of the plaintiff, and that the negligence of the plaintiff contributed to the loss thereof."

The plaintiff denies, in his reply, that he had "notice that defendants required their guests to deposit overcoats in a place which defendants had prepared for that purpose; and denies that he negligently or carelessly left said overcoat in an open hall, or that he in any way, by any carelessness of himself, contributed to its loss."

The case was tried to a jury. On the trial the plaintiff proved that he was a guest at the hotel of the defendants on the 12th of December, 1865, when the coat was lost; that he came down from his room, late in the morning, to breakfast, with his overcoat, and, instead of going to the office, he hung up his coat in the hall, where there were three or four rows of hooks, and went into breakfast from the hall; and that when he came out his coat was gone. The plaintiff testified, on cross-examination, that he knew there was a place at the office where carpet-bags and coats were taken and checks given therefor, and that he had before deposited coats at the office.

One of the defendants testified that they kept a place back of the counter, in the office, where they kept and checked coats and satchels; that he had frequently checked the plaintiff's satchel there before the 12th of December; that they kept some one there to receive these articles and give checks therefor; that the plaintiff had stayed there at different times before for several days at a time; and that when the coat was lost, a general search was made for it, and it could not be found; that the hooks in the hall were for hats, and were placed in three or four rows, beginning two or three feet from the floor; that they had large printed notices in the office and some other rooms (but not in the hall), that "persons stopping at this hotel will please have their baggage checked, carpet-bags, and coats; and if they have any diamonds, precious stones, watches, or jewelry, they must be kept in the office, in order to make the proprietors responsible."

The court charged the jury as follows:

"4. The defendants had a right to require that the plaintiff should place his overcoat, &c., in a designated place in the office, or keep it in his own room when it is not on his own person, or in his own personal custody; and if they did so require, and brought this requirement to the knowledge of the plaintiff; and if you shall find that the requirement was a reasonable one, and that the property was lost in consequence of the refusal or neglect of the plaintiff to comply with such reasonable precaution, he is not entitled to recover in this action.

"5. The defendants had the right to make reasonable rules and regulations for their own protection, and to limit, to some extent, their liability; but, in order to so limit their liability in this case, it must be shown that the knowledge of the existence of such a rule or regulation was brought home to the plaintiff before the loss of his property.

"6. A printed request merely posted in the rooms of the house, requesting or asking guests to leave their overcoats, carpet-sacks, or other baggage in the care of the landlord or his servants in the office, will not relieve the defendants from liability in case of its loss. To have this effect, the notice must state in clear and unequivocal terms that they will not be responsible for the loss unless the property is left in the office, or other designated place; and must be brought to the knowledge of the guest."

The jury returned a verdict for the defendants. The plaintiff moved for a new trial, on the ground [among others] that the court erred in the charge to the jury. The court overruled the motion for a new trial; to which exception was taken.[1]

Day, C. J. Three classes of questions are raised in this case in which, it is claimed, the court below erred: 1. In permitting the defendant to ask his witnesses on the trial illegal questions; 2. In the refusal of the court to charge the jury as requested by the plaintiff, and in the charge given; 3. In overruling the motion for a new trial.

Nothing practically will be gained by considering here at length the separate questions raised by the objections of the plaintiff to the questions propounded by the defendants to their witnesses on the trial; for some of the objections are based upon grounds that must be considered in another form, arising upon the charge to the jury; some of the questions were unobjectionable, and of little or no importance; but chiefly for the reason that the testimony elicited on all the questions in no way tended to prejudice the plaintiff; and for that reason, under the provisions of the 138th section of the code, the ruling of the court on that class of questions will not afford sufficient ground to disturb the judgment.

Did the court erroneously charge the jury?

By the statute of this State the common-law responsibility of innkeepers, as to all goods therein enumerated, is materially modified. The goods sued for in this case are not mentioned in the act; it has, therefore, no application to the case, further than the reason of the legislative policy on which it is based may be regarded in deciding cases between conflicting constructions of the rules of common law, by which this case must be determined.

It is claimed that the common law makes an innkeeper an insurer of the goods of his guest, as it does a common carrier of goods, against all loss, except that occasioned by act of God or the public enemy.

The rules of the law controlling both these classes of liability have their foundation in considerations of public utility; but it does not therefore follow that the rule in every case is precisely the same. It would seem, rather, that where the circumstances of the two classes differ, public utility might reasonably require a corresponding modification of the rules applicable to the case.

[1] Only so much of the case as involves the validity of the regulations is given. — Ed.

Common carriers ordinarily have entire custody and control of the goods intrusted to them, with every opportunity for undiscoverable negligence and fraud; and are therefore held to the most rigid rules of liability. Innkeepers may have no such custody of the goods of their guests. In many instances their custody of the goods is mixed with that of the guest. In such cases it would be but reasonable that the guest, on his part, should not be negligent of the care of his goods, if he would hold another responsible for them. The case of a carrier and that of an innkeeper are analogous; but, to make them alike, the goods of the guest must be surrendered to the actual custody of the innkeeper; then the rule would, undoubtedly, be the same in both cases.

We are not, however, disposed to relax the rules of liability applicable to innkeepers, nor to declare that they are different from those applying to carriers, further than a difference of circumstances between innkeeper and guest may reasonably necessitate some care on the part of the latter.

The charge of the court below is not inconsistent with a recognition of the same extent of liability in both classes of cases; for it is well settled that an action against a carrier cannot be maintained where the plaintiff's negligence caused, or directly contributed to the loss or injury. Upon this theory, and assuming to the fullest extent the *prima facie* liability of the innkeeper, by reason of the loss, the court said to the jury: "The only question for your consideration is whether the plaintiff's negligence caused, or directly contributed to, the loss of the property."

It was thus held by the court, and conceded by the counsel for the plaintiff, that if the property was "lost by reason of the negligence of the plaintiff to exercise ordinary care for its safety," the defendants were not liable.

The essential question, then, between the parties is, what, on the part of the guest, is ordinary care, or what may be attributed to him as negligence.

It is claimed that the court erred in relation to this point, in two particulars: 1. In holding that the guest might be chargeable with negligence, in the care of his goods, in any case where they were not actually upon his person; 2. In holding that the innkeeper could, in any manner, limit his liability for the loss of the goods of his guest, except by contract with him.

If the guest take his goods into his own personal and exclusive control, and they are lost, while so held by him, through his own neglect, it would not be reasonable or just to hold another responsible for them. This is conceded to be true as to the clothes on the person of the guest, but is denied as to property otherwise held by him. There is no good reason for the distinction; for the exemption of the innkeeper from liability is based upon the idea that the property is not held as that of a guest, subject to the care of the innkeeper, but upon the responsi-

bility of the guest alone; and, therefore, it makes no difference, in principle, whether it is on his person or otherwise equally under his exclusive control. But this must be an exclusive custody and control of the guest, and must not be held under the supervision and care of the innkeeper, as where the goods are kept in a room assigned to the guest, or other proper depository in the house.

The public good requires that the property of travellers at hotels should be protected from loss; and, for that reason, innkeepers are held responsible for its safety. To enable the innkeeper to discharge his duty, and to secure the property of the traveller from loss, while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest, with the information that, if not observed by him, the innkeeper will not be responsible, ordinary prudence, the interest of both parties, and public policy, would require of the guest a compliance therewith; and if he should fail to do so, and his goods are lost, solely for that reason, he would justly and properly be chargeable with negligence. To hold otherwise, would subject a party without fault to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of innkeepers to an unreasonable extent. Story's Bail. secs. 472, 483; Ashill *v.* Wright, 6 El. & Bl. 890; Purvis *v.* Coleman, 21 N. Y. 111; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417.

Nor does the rule thus indicated militate against the well-established rule in relation to the inability of carriers to limit their liability; for it rests upon the necessity that, under different circumstances of the case, requires the guest to exercise reasonable prudence and care for the safety of his property.

In connection with the two foregoing propositions, the correctness of the holding of the court below, as stated in the seventh paragraph of the charge, is questioned. Without repeating that paragraph here, it is only necessary to say that upon the hypothesis there stated, the guest, by what he did and neglected to do, would directly contribute to the loss of his property. The charge was therefore right.

Taking the whole charge together, so far as it related to the case, and is controverted, it is in harmony with the views herein expressed, and must therefore be approved. It also follows, from what has been said, that the court did not erroneously refuse to charge the jury as requested by the plaintiff. The request contained a connected series of propositions, some of which, at least, were unsound in law. It is well settled that in such a case the court may properly refuse the whole.

MONTGOMERY *v.* BUFFALO RAILWAY COMPANY.

COURT OF APPEALS OF NEW YORK, 1900.

[165 *N. Y.* 139.]

THIS action was brought by the plaintiff against the defendant, a street railway company, to recover damages for an assault and battery, alleged to have been committed upon him by a conductor in forcibly expelling him from the car. He had paid his fare, upon entering one of the defendant's cars upon a connecting line, and with a transfer ticket, got upon the car in question. He placed himself upon the rear platform and tendered his transfer ticket to the conductor. One of the company's rules provided that conductors should "not allow passengers to sit, or stand on, or to crowd the rear platform, but will politely request them to take seats or to stand inside the car," and the conductor, calling plaintiff's attention to it, directed him to go inside the car. The plaintiff declined to do so; stating that he had a sick headache, was nauseated, and that he expected to be affected actively by the nausea at any moment. The conductor, however, insisted upon his compliance with the rule and, the plaintiff refusing compliance, the car was stopped and the plaintiff was ejected therefrom; but with no excessive force, or physical injury.

GRAY, J. The company not only had the right, but it was bound, to make rules and regulation to insure the safe, effective, and comfortable operation of its corporate business, and whether any particular rule is lawful and reasonable is a question of law for the court. The appellant concedes that the rule of the company was a reasonable one and thus the question is whether, because it was enforced by the conductor, in the expulsion of the plaintiff from the car upon his refusal to submit to it, the company can now be made answerable in damages by reason of the conductor's action. The proposition would seem to furnish its own answer.

The appellant, however, insists that, even if this rule was a reasonable regulation of the company, all rules, even if reasonable, "must have their exceptions," and whether it was reasonable to enforce the rule upon this occasion, was a question to be passed upon by a jury. In other words, it is claimed that the right of enforcement may depend upon the particular circumstances and, as the plaintiff had an excuse for non-compliance, in the present case, its reasonableness, or that of the conductor's conduct, became a question for the determination of the jury. I am unable to assent to the proposition. I think that, if the rule was a reasonable one, the passenger was bound to submit to it and that it was the duty of the conductor to enforce it. Therefore, in ejecting him from the car upon his refusal to submit, the conductor

was acting lawfully in the discharge of his duty. The passenger, by his conduct, had forfeited his right to be carried any further. In Hibbard *v.* N. Y. & E. R. R. Co. (15 N. Y. 455), an early and leading case, the question was fully discussed and its doctrine has been followed in this court. (Pease *v.* D., L. & W. R. R. Co., 101 N. Y. 367.) Barker *v.* Central Park, N. & E. R. R. R. Co. (151 N. Y. 237), is a recent case, in which the right of the carrier to make and to enforce its reasonable rules is distinctly recognized. It might be observed that there is quite a difference between such a case as the appellant's counsel mentions, where a passenger is ejected for failure to produce his ticket upon the conductor's request, which another conductor had previously taken up and retained, and such a case as this. In the former case it could be argued, with more force, that the passenger's inability to comply with the conductor's request was caused by the mistake, or fault of another of the company's servants, and the theory of the corporate liability would be rested upon different propositions.

A railway company is not obliged to carry persons, unless they are willing to submit to, and to be bound by, the reasonable rules and regulations which it has established. The plaintiff, if in the physical condition described by him upon the day in question, was not obliged to travel upon the defendant's street car; but if he chose to do so, he was bound to submit to its regulations. He has no sufficient reason in law for complaining, because the conductor performed his duty and compelled him to leave the car.

I think the order and judgment were right and should be affirmed, with costs.

PARKER, C. J., O'BRIEN, LANDON and WERNER, JJ., concur; HAIGHT and CULLEN, JJ., not voting. *Order and judgment affirmed.*

Q. Reasonableness of regulation for Ct. to pass on?

DANIEL *v.* NEW JERSEY STREET RAILWAY COMPANY.

COURT OF ERRORS OF NEW JERSEY, 1900.

[64 *N. J. L.* 603.]

GARRISON, J. The plaintiff, carrying in his arms in plain view a small goat, got on one of the cars of the defendant and paid his fare; later he paid a second fare and received from the conductor a token that entitled him to be transferred to another car of the defendant company. At the proper junction he presented this token to the conductor on the transfer car who refused to allow him to board the car with the goat. This was the plaintiff's case. A regulation of the defendant corporation forbidding the carrying of animals in its cars was proved, and the case went to the jury. The jury were told by the trial court that if the regulation in question was an unreasonable one, the defend-

ant would be liable in damages for enforcing it, and that if it was a reasonable one the defendant, before enforcing it, must call the attention of the passenger to it, which was not done in this case. In effect this directed a verdict for the plaintiff, without regard to the finding of the jury upon the only question submitted to it, viz., whether the regulation of the defendant allowing no animals to be carried in their cars was a reasonable one.

Inasmuch as the court is unanimously of the opinion that it was error to submit this question to the jury, the judgment will be reversed for that error without reference to the assignment touching the necessity of giving notice of a reasonable regulation before enforcing it.

The unanimity with which this result is reached does not, however, extend to the line of reasoning pursued in reaching it. Hence, no general rule upon the question of the relative functions of court and jury with respect to the reasonableness of corporate regulations can be laid down at this time. A majority of the court, however, are of opinion that the defendant company might lawfully adopt some regulation with respect to the carrying of animals on its cars, and that the reasonableness of such a rule, would be a question for the trial court and not for the jury. Whether, as a class, questions as to the reasonableness of corporate regulations are for the jury, to be taken from it only when deemed to be free from doubt; or whether they are primarily court questions, to be left to jurors only when some other standard than that of reasonableness enters into the test of corporate duty, is a point upon which the majority is not agreed *inter sese.*

It suffices for the decision of the present case to say that in either of these views it was error to leave to the jury the reasonableness of this regulation. It should have been decided by the court.

To this extent the cases of State *v.* Overton, 4 Zab. 435; Morris & Essex Railroad Co. *v.* Ayres, 5 Dutcher, 393; Compton *v.* Van Volkenburgh, 4 Vroom, 134, are disapproval; although the learned judge who tried the case did right to follow these Supreme Court decisions for the reasons given by Chief Justice BEASLEY in the Compton case.

It is thought best to say that the question of the corporate authority of the defendant to carry animals on its cars is not involved in the decision of this case.

Let the judgment be reversed.

DICKERMAN *v.* ST. PAUL UNION DEPOT COMPANY.

SUPREME COURT OF MISSISSIPPI, 1890.

[44 *Minn.* 433.]

GILFILLAN, C. J. No claim is made, and none could well be made, against the reasonableness of the rules of the defendant requiring persons passing through the gates for the purpose of taking trains to exhibit their tickets to the gate-keeper and have them punched by him, and providing that no passenger shall be allowed to pass out of any gate after the train indicated by his ticket has started, or to board any train while in motion. Such or similar rules would seem absolutely necessary to preserve to the defendant control of its grounds, and to enable it to receive and discharge passengers with order, and to the safety, comfort, and convenience of the passengers. All persons having notice of such rules, and a reasonable opportunity to comply with them, are bound to observe them in order to have a right to pass through the gates or to take a train at defendant's depot; and the defendant has a right to enforce such rules, and to prevent their violation, and to use such force as may be reasonably necessary to that end. If in no such case it may use force, then the right to enforce the rules and prevent their violation is but a barren right.

On the occasion which furnished the subject-matter of this action, the plaintiff, while the gate-keeper was occupied in inspecting and punching the tickets of passengers who were going through the gate, passed through without presenting his ticket to be inspected and punched, and without the consent of the gate-keeper, who immediately seized him by the coat, demanding to see his ticket, and, on his showing his ticket, told him he could not go, and, as plaintiff tells it, on his persisting in going, held him till the train he was intending to take had passed out of the depot. The ticket was for the short-line from St. Paul to Minneapolis, on the Chicago, Milwaukee & St. Paul Railway. Whether that train had already started at the time when plaintiff showed his ticket, the evidence was conflicting, making it a question, so far as material, for the jury.

The theory of the law of the case claimed by plaintiff is presented by one of his requests to instruct the jury as follows: "No violation of any rule, regulation, or practice, on the part of the plaintiff, would justify or excuse the seizure of the plaintiff against his will, after he had passed through the gate." Without determining whether, in passing through the gate in violation of the rule of the defendant, the plaintiff became a trespasser upon that part of the depot without the gate, we will say that the proposition of this request is incorrect. It implies that the instant plaintiff wrongfully got through the gate his obligation to comply with the rule and right of defendant to insist on compliance with it ceased. The gate-keeper had the right to stop him at the gate,

and demand sight of his ticket to be punched, and, if necessary in order to stop him for that purpose, had the right to take hold of him, and this right did not cease merely because the plaintiff had wrongfully got across the line of the gate. The keeper still had the right to enforce the rule; certainly, while plaintiff was so near the gate as to be practically at it, which was the fact in this case.

The theory of law on which the court below put the case to the jury is presented in a part of its general charge excepted to by plaintiff. After charging that if, after passing through the gate, the plaintiff could have boarded his train before it started or was in motion, then he is entitled to recover at least nominal damages, it said: "If, on the other hand, you find from the evidence that the train plaintiff was intending to take had started before he passed through the gate, or that after he passed through the gate the train started and was in motion before plaintiff could have reached it and got on board if he had not been detained by defendant or interfered with by the gate-man, and if you further find from the evidence that no more force or violence was used by the gate-keeper than to detain plaintiff, and that he was detained no longer than was necessary to prevent his boarding the train when it was in motion, then the plaintiff is not entitled to recover." This charge is to be taken in connection with the state of the evidence, even that of plaintiff himself, which shows, beyond any question, that he, while detained by the gate-man, insisted upon taking the train in question, and would, had he not been prevented, have attempted to take it even though in motion. To have done so would have violated the rule of the defendant, that no passenger shall be allowed to board any train while in motion, a rule which the defendant had the same right to enforce as to enforce that requiring passengers to exhibit their tickets in passing through the gates. The charge excepted to was only to the effect that the defendant had the right to use such force as was necessary to prevent a violation of the rule; that is, to prevent parties boarding trains while in motion. And that proposition is correct.

Order affirmed.

HART *v.* SOUTHERN RAILWAY COMPANY.

SUPREME COURT OF GEORGIA, 1904.

[119 *Ga.* 927.]

LAMAR, J. This suit was for wrongful expulsion, and not for damages inflicted upon the plaintiff as a result of his being compelled to alight from a moving train. The fact that one actually purchased a ticket, and that this was known to the agent who sold it, or to the gate-keeper who examined it, or to employees on the train who saw it,

would not relieve the passenger of the obligation to surrender it to the conductor. Tickets vary in their terms. Some are good only on certain trains; others only on particular dates; others require validation. The mere fact that the plaintiff has a ticket does not, therefore, necessarily establish his right to be transported on a given train. These matters must be passed on by the conductor, and not by other employees who are not charged with this duty by the company. When the conductor makes his demand, he is entitled to have the ticket surrendered. He cannot be required to hear evidence or investigate the *bona fides* of the passenger's excuse for its non-delivery, nor to wait until he arrives at the next station and, by telegraphic correspondence with the selling agent, undertake to verify the correctness of the plaintiff's statement, or determine the character and validity of the ticket sold. It is manifest that such course would necessarily give rise to delay, and seriously interfere with the operation of trains and the rights of the travelling public. Had the plaintiff's money blown out of his hand, it is evident that his misfortune would have to fall upon himself and not upon the company. Such loss would not have prevented his lawful eviction. The same result would follow where the ticket itself was lost; for it might have come into the hands of another, and the company might thereby have been compelled to carry two passengers for one fare. Besides, any rule allowing an excuse as a substitute for a ticket would give rise to so much uncertainty and so many possibilities of fraud that the courts have uniformly held that the failure to pay the fare or produce the ticket warrants an eviction. In fact the plaintiff in error concedes the general rule to be that the passenger must produce his ticket, pay his fare, or suffer expulsion. He insists, however, that the special circumstances take this case out of the general rule. We fail to find any case warranting such a holding. Those cited by him, in 32 L. R. A. 193, and 56 L. R. A. 224, as well as Pullman P. C. Co. *v.* Reed, 75 Ill. 125, were on facts essentially different. See, on the general subject, L. & N. R. Co. *v.* Fleming, 14 Lea, 128; Rogers *v.* Atlantic City R. Co., 34 Atl. 11; Fetter on Carriers, § 279. Compare Southern Ry. Co. *v.* De Saussure, 116 Ga. 53; G. S. & F. Ry. Co. *v.* Asmore, 88 Ga. 529. Pleadings are to be strictly construed against the pleader. Here it affirmatively appears that plaintiff did not have funds with which to pay the cash fare. The general demurrer having been sustained, and the judgment affirmed here, there is nothing to amend by. It is not like the case where the demurrer was overruled in the lower court and the judgment reversed, nor like the case where the demurrer was sustained or should have been sustained only on a special ground not concluding the merits. Central R. *v.* Patterson, 87 Ga. 646; Savannah Ry. *v.* Chaney, 102 Ga. 817; Brown *v.* Bowman, 119 Ga. 153. There is nothing in the facts here to require the exercise of any discretionary power by this court to permit such amendment.

Judgment affirmed. All the Justices concur.

REESE *v.* PENNSYLVANIA RAILROAD.

SUPREME COURT OF PENNSYLVANIA, 1890.

[131 *Pa.* 422.]

ON October 31, 1888, L. B. D. Reese brought trespass against the Pennsylvania Railroad Company to recover damages for the alleged unlawful ejecting of the plaintiff from a passenger train of the defendant. Issue.

At the trial on September 17, 1889, the following facts were shown: About eleven o'clock on the evening of October 24, 1888, the plaintiff, in company with two friends, boarded a passenger train of the defendant company at East Liberty station, in the city of Pittsburgh, for the purpose of going to the Union station in said city. The testimony for the plaintiff tended to prove that they arrived at East Liberty station just as the train was about to start, and too late to get tickets; while witnesses for the defendant testified that the plaintiff and his companions were at the station some minutes before the train left. The ticket office at East Liberty was kept open the usual length of time prior to the departure of that train, and afforded all persons who were at the station before it started an opportunity to procure tickets.

The defendant company was incorporated by Act of April 13, 1846, P. L. 312, § 21 of which provides that "in the transportation of passengers, no charge shall be made to exceed three cents per mile for through passengers, and three and one-half cents per mile for way passengers."

After the train had started, the conductor called upon the plaintiff for his ticket, when the plaintiff stated that he had none and tendered to the conductor the sum of fourteen cents in cash. The distance between the East Liberty and Union stations is four and one half miles, and the regular and uniform fare charged by the defendant between those points was fourteen cents, being at the rate of three cents a mile. The company, however, had a regulation requiring passengers without tickets to pay to the conductor, in addition to the regular fare of three cents per mile, the additional sum of ten cents. The amount so to be paid in excess of the regular fare was uniform in all cases, irrespective of the distance the passenger was travelling,

and upon its payment the conductor was required to give to the passenger a memorandum or check, signed by the general passenger agent of the company, redeemable at ten cents on presentation at any ticket office of the company along its road. This memorandum is known as a "duplex ticket," the conductor being required to retain and forward to the auditor of passenger receipts a duplicate of each one issued. It is printed upon a form so arranged that the stations from and to which fare is collected can be indicated upon it by punch marks, and conductors are required to do this in all cases. Of this regulation, notice was given to the public by printed cards posted at the company's ticket offices.

Acting under the regulation of the company respecting the payment of cash fares, the conductor refused to accept the fourteen cents tendered him by the plaintiff and demanded twenty-four cents. The plaintiff declined absolutely to pay more than fourteen cents, whereupon he was put off the train at Roup station.

The jury rendered the following verdict: "We find for the plaintiff in the sum of two hundred and fifty dollars ($250). And we have further answered the annexed questions submitted to us for answer as part of the verdict:

"1. Did the plaintiff, Mr. Reese, on the evening in question, arrive at the East Liberty station in time to procure a ticket before getting on the train?

"No."

"2. Did the conductor, when demanding from the plaintiff twenty-four cents fare, or before putting him off the train, inform him that he would obtain a receipt entitling him to be repaid ten cents of the fare on presentation at the proper office; or did Mr. Reese know that such was the regulation?

"No."

Judgment having been entered upon the verdict, the defendant took this appeal.[1]

MITCHELL, J., the right of railroad companies to make reasonable regulations, not only as to the amounts of fares, but as to the time, place, and mode of payment, is unquestionable. This right includes the right to refuse altogether to carry without the previous procurement of a ticket. Lake Shore, &c. Ry. Co. *v.* Greenwood, 79 Pa. 373. That case arose upon a special regulation as to the carriage of passengers upon freight trains; but there is no appreciable distinction between it and a general regulation as to all passengers. Both rest on the common-law principle that requires payment or tender as an indispensable preliminary to holding a carrier liable for refusal to carry, and on the manifest and necessary convenience of business, where the

[1] The points assigned for error were: 1, refusal of the trial court to charge that the regulation was reasonable and legal; 2, charge of the court that the amount demanded was in excess of the statutory amount.

The statement of facts has been abridged and arguments of counsel omitted.—ED.

number of passengers is liable to be large and the time for serving them short.

So, too, the authorities are uniform that companies may charge an additional or higher rate of fare to those who do not purchase tickets before entering the cars. Crocker *v.* Railroad Co., 24 Conn. 249; Swan *v.* Railroad Co., 132 Mass. 116; Hilliard *v.* Goold, 34 N. H. 241; Stephen *v.* Smith, 29 Vt. 160; State *v.* Goold, 53 Me. 279; State *v.* Chovin, 7 Iowa, 208; Du Laurans *v.* Railroad Co., 15 Minn. 49; State *v.* Hungerford, 39 Minn. 6 (34 Amer. & Eng. R. Cas. 265), and note; Chicago, &c. R. Co. *v.* Parks, 18 Ill. 460; Pullman Co. *v.* Reed, 75 Ill. 130; Railroad Co. *v.* Skillman, 39 Ohio, 451; Forsee *v.* Railroad Co., 63 Miss. 67. And it may be noted, in response to one of the most urgently pressed arguments of the defendant in error, that the reasons almost uniformly given in support of this long line of decisions include the furthering of the honest, orderly, and convenient conduct by the railroad company of its own business.

The regulation in question in the present case, is not in itself unreasonable or oppressive. In regard to the traveller, it is scarcely just ground of complaint that he has to present his refunding ticket at the end of his journey, instead of getting an ordinary ticket at the start. The inconvenience, if any, is the result of his own default. With reference to the other passengers, and still more to the railroad company, the regulation is conducive to the rapid, orderly, and convenient despatch of the conductor's part in the collection of fares, and thus to leaving him free for the performance of his other duties in connection with the stops at stations, the entrance and exit of passengers, and the general supervision of the safety and comfort of those under his care.

If, therefore, the company may refuse to carry at all without a ticket, it may fairly refuse under the far less inconvenient alternative to the traveller of putting him to the trouble of going to an office to get his excess refunded. If the company may charge those failing to get a ticket an additional price, and keep it, certainly they may charge such price and refund it; and, as the regulation is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveller, its validity, upon general principles and on authority, would seem to be beyond question.

These views were conceded by the learned judge below, and are not seriously questioned by counsel here. But the decision was based upon the view that the extra ten cents imposed by this regulation is a part of the fare, and makes it higher than the rate allowed by the act of incorporation of the company. The language of the act is, "In the transportation of passengers no charge shall be made to exceed . . . three and one-half cents per mile for way passengers." As the distance from East Liberty station to the Union station in Pittsburgh is four and one-half miles, and the regular fare fourteen cents, it is admitted that the extra ten cents is in excess of the charter rate, if it is

a "charge for transportation" within the meaning of the act. Should it be so regarded? "Charge" is a word of very general and varied use. Webster gives it thirteen different meanings, none of which, however, expresses the exact sense in which it is used in this charter. The great dictionary of the Philological Society, now in course of publication, gives it twenty separate principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions, one (10 *b*) is, "The price required or demanded for service rendered, or (less usually) for goods supplied;" and this expresses accurately the sense of the word in the present case. The essence of the meaning is that it is something required, exacted, or taken from the traveller as compensation for the service rendered, and, of course, something taken permanently, — not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount of fares, not of the mode of collection; the protection of the traveller from excessive demands, not interference with the time, place, or mode of payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge, within the prohibition of the charter.

Nor is there any force in the objection that this regulation is unreasonable. It is said not to be general, fair, and impartial, because it provides that as to passengers getting on the train at stations where there is no ticket office, &c., or on trains where, on account of the excessive rush of business, it is impossible to issue the refunding check, the collection of the excess shall be omitted. The objection overlooks the necessary qualifications to the validity of such a regulation. All the cases are agreed that the regulation would be unreasonable, and therefore void, unless the carrier should give the passenger a convenient place and opportunity to buy his ticket before entering the train. This part of the regulation merely puts in express words a necessary exception which the law would otherwise imply. So, as to the excessive rush of business. Reasonableness depends on circumstances. To collect the extra amount and issue return checks to as many passengers as the conductor could reach in time, and let all others go free entirely, would be much more unreasonable than to treat all alike and dispense with the regulation for the time being. Necessity modifies the application of all rules, and there is nothing unreasonable in requiring the conductor to exercise sufficient foresight to see whether he can perform the prescribed duty in the available time, and investing him with the discretion to omit it altogether, if, in his judgment, he cannot perform it fully.

No authorities precisely in point have been found upon either side. The cases cited by the defendant in error, from Kentucky and Ohio, are widely distinguishable, as they were cases of absolute charge beyond the charter limit, without any provision for return of the excess

to the traveller. But on well-settled principles we are of opinion that the regulation is reasonable in itself, and not in violation of the restriction in the act of incorporation. The defendant's first point should therefore have been affirmed. *Judgment reversed.*

FORSEE *v.* ALABAMA GREAT SOUTHERN RAILROAD.

SUPREME COURT OF MISSISSIPPI, 1885.

[63 *Miss.* 66.]

ABOUT nine o'clock P. M., on September 20, 1884, S. P. Forsee went to the ticket office of the Alabama Great Southern R. R. Co. at Toomsuba, for the purpose of buying a ticket and taking passage for Meridian on that company's train, which was due at Toomsuba at about half-past nine o'clock P. M. The depot was dark, no ticket agent could be seen or found, and as it was raining slightly Forsee and his companion, one Poole, left the depot, where, as they claimed, there was no adequate shelter, and went over to a store near by, but from which they could still view the depot and watch for the train. No one was seen about the depot until the train approached, when a man with a mail bag ran out. Forsee seized him and said to him that he had tried to get a ticket but had not been able to find any one at the depot. The man, who proved to be the agent, replied that it was then too late. Forsee went to the conductor and told him that he had been unable to buy a ticket because the agent was not on hand. Forsee then boarded the train, and when the conductor came to him for his fare again told him he had no ticket and why he had failed to get one, but tendered him thirty-five cents, the amount of the regular ticket rate between Toomsuba and Meridian. The conductor declined to receive it, and demanded fifty cents, explaining to Forsee that his instructions were positive to collect fifty cents from passengers going from one to the other point mentioned who failed to purchase tickets. Forsee still refused to pay more, when the conductor stopped the train, seized Forsee, and with the assistance of two train men was about to put him off. Forsee, rather than be put off, paid fifty cents under protest, and afterward brought this action to recover damages for the alleged injury that resulted to him from the neglect and wrongful conduct of the railroad company's agents.

Plaintiff introduced evidence tending to show that the conductor acted in a rough, insulting, and insolent manner, while the defence introduced evidence tending to show the opposite, and that the conductor used no more force than was necessary.

Plaintiff offered to prove by witnesses and by the deposition of one C. P. Blanks that the acting ticket agent was a boy of sixteen years,

that he was careless and indifferent, and that he had been previously reported to defendant for neglecting his duties. This evidence the court below refused to admit.

Plaintiff further offered to prove by two witnesses that he was at the time in a delicate state of health, and that he would have probably received serious and permanent injuries had he been put off the train, and that owing to the delicate state of his health, any undue excitement of mind was injurious, but the court below refused to admit such testimony.

Plaintiff also offered to prove that on the day following his attempt to purchase the ticket, the ticket agent had admitted to some third person that he was asleep before and on the arrival of the train on the day in question, and that the depot was not lighted; and this evidence the court below refused to admit. The jury rendered a verdict for plaintiff, and fixed his damages at fifty dollars, and thereupon the court adjudged that each party pay his own costs. The plaintiff appealed.

ARNOLD, J. There was no error in sustaining the objection to the proposed testimony in regard to appellant's health. It is not claimed that his health was affected by the occurrence of which he complains, and evidence on that subject was irrelevant.

The testimony offered, including the deposition of C. P. Blanks in regard to the character of the ticket agent, was properly excluded. It was shown that the agent was not at his post, and that the ticket office was not open in time for appellant to obtain a ticket, and the character of the agent under these circumstances was immaterial.

The alleged admissions or declarations of the ticket agent, made a day or more after the occurrence to which they related, were incompetent, and the objection to the testimony introduced to prove such admissions or declarations was well taken. Moore *v.* Chicago, &c., Railroad Co., 59 Miss. 243.

It is competent for a railroad corporation to adopt reasonable rules for the conduct of its business, and to determine and fix, within the limits specified in its charter and existing laws, the fare to be paid by passengers transported on its trains. It may, in the exercise of this right, make discrimination as to the amount of fare to be charged for the same distance, by charging a higher rate when the fare is paid on the train than when a ticket is purchased at its office. Such a regulation has been very generally considered reasonable and beneficial both to the public and the corporation, if carried out in good faith. It imposes no hardship or injustice upon passengers, who may, if they desire to do so, pay their fare and procure tickets at the lower rate before entering the cars, and it tends to protect the corporation from the frauds, mistakes, and inconvenience incident to collecting fare and making change on trains while in motion, and from imposition by those who may attempt to ride from one station to another without payment, and to enable conductors to attend to the various details of their duties on the train and at stations. State *v.* Goold, 53 Maine, 279; The

Jeffersonville Railroad Co. *v.* Rogers, 28 Ind. 1; Swan *v.* Manchester, &c. Railroad Co., 132 Mass. 116.

But such a regulation is invalid, and cannot be sustained, unless the corporation affords reasonable opportunity and facilities to passengers to procure tickets at the lower rate, and thereby avoid the disadvantage of such discrimination. When this is done, and a passenger fails to obtain a ticket, it is his own fault, and he may be ejected from the train if he refuses to pay the higher rate charged on the train.

When such a regulation is established, and a passenger endeavors to buy a ticket before he enters the cars, and is unable to do so on account of the fault of the corporation or its agents or servants, and he offers to pay the ticket rate on the train, and refuses to pay the car rate, it is unlawful for the corporation or its agents or servants to eject him from the train. He is entitled to travel at the lower rate, and the corporation is a trespasser and liable for the consequences if he is ejected from the train by its agents or servants. The passenger may, under such circumstances, either pay the excess demanded under protest, and afterwards recover it by suit, or refuse to pay it, and hold the corporation responsible in damages if he is ejected from the train. 1 Redfield on Railways, 104; Evans *v.* M. & C. Railroad Co., 56 Ala. 246; St. Louis, &c. Railroad Co. *v.* Dalby, 19 Ill. 353; St. Louis, &c. Railroad Co. *v.* South, 43 Ill. 176; Smith *v.* Pittsburg, &c. Railroad Co., 23 Ohio St. 10; Porter *v.* N. Y. Central Railroad Co., 34 Barb. 353; The Jeffersonville Railroad Co. *v.* Rogers, 28 Ind. 1; The Jefferson Railroad Co. *v.* Rogers, 38 Ind. 116; State *v.* Goold, 53 Maine, 279; Swan *v.* Manchester, &c. Railroad Co., 132 Mass. 116; Du Laurans *v.* St. Paul, &c. Railroad Co., 19 Minn. 49.

In such case exemplary damages would not be recoverable, unless the expulsion or attempted expulsion was characterized by malice, recklessness, rudeness, or wilful wrong on the part of the agents or servants of the corporation. Chicago, &c. Railroad Co. *v.* Scurr, 59 Miss. 456; Du Laurans *v.* St. Paul, &c. Railroad Co., 19 Minn. 49; Pullman, &c. *v.* Reed, 75 Ill. 125; Hamilton *v.* Third Avenue Railroad Co., 53 N. Y. 25; Townsend *v.* N. Y. Central Railroad Co., 56 N. Y. 295; Paine *v.* C. R. I. & P. Railroad Co., 45 Iowa, 569; McKinley *v.* The C. & N. W. Railroad Co., 44 Iowa, 314.

The cause was tried in the court below on theories and principles of law different from those here expressed, and the judgment is reversed and a new trial awarded.

Reversed.

PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY *v.* RICE.

COURT OF APPEALS OF MARYLAND, 1885.

[64 *Md.* 63.]

ROBINSON, J., delivered the opinion of the Court.

The appellee, plaintiff below, bought a round trip ticket from Wilmington to Philadelphia. The ticket was in two coupons attached to each other, — one being for the trip to Philadelphia, and the other for the return trip. Shortly after leaving Wilmington, the conductor came through for tickets, took the plaintiff's ticket, tore off the coupon for the trip to Philadelphia, and by *mistake* punched the return coupon. A few minutes after, he came back and said to plaintiff, "let me see that ticket, I think I have made a mistake." He then took the ticket which was the return coupon punched by him, and wrote on the back of it with a pencil the words "cancelled by mistake," and returned it to the plaintiff, saying, "I have fixed it all right, now you can ride on it." The next day, the plaintiff on the return trip to Wilmington handed to the conductor of that train the punched coupon, which, however, he declined to accept, because it had been cancelled. The plaintiff then called his attention to the writing on the back of the ticket, and explained how it had been punched, and the mistake corrected by the conductor on the trip to Philadelphia. But the conductor declined to accept the explanation, saying to the plaintiff, "anybody could have written that, you could have done it yourself." The mistake, it seems, had not been corrected according to the rules of the company, which required the conductor making the mistake to draw a ring around the cancellation mark, and write on the back of the ticket the word "error," and sign his name or initials. The conductor accordingly demanded of the plaintiff the fare from Philadelphia to Wilmington, and upon his refusal to pay it, he was put off the train.

Upon these facts it is admitted an action will lie against the company for a breach of contract as a carrier, or for the negligence of the conductor in cancelling the plaintiff's ticket, and thereby destroying the only evidence of his right to the return trip; but inasmuch as the cancellation had not been corrected according to the rules of the company, the ejection of the plaintiff under such circumstances, it is argued, does not in itself furnish a substantive ground of action. We shall not stop to examine the several cases relied on in support of this contention. Hufford *v.* Grand Rapids and I. R. R. Co., The Reporter, 18 Vol., 147; Frederick *v.* The Marquette, Houghton and Ontonagon R. R. Co., 37 Michigan, 342; Yorton *v.* The Milwaukee, Lake Shore, and Western Railway Co., 54 Wisconsin, 234; Bradshaw *v.* South Boston R. R. Co., 135 Mass. 407.

It is sufficient to say the facts in this case differ materially from the facts in those cases. Here the plaintiff was *wholly without fault.* He

had purchased a ticket which entitled him to a round trip from Wilmington to Philadelphia. The return coupon was cancelled through the mistake of the conductor; this error he attempted to correct, and informed the plaintiff that it was all right. The latter had a right to rely on this assurance, and that the ticket for which he had paid his money entitled him to return to Wilmington.

If the servants of the appellant under such circumstances laid their hands forcibly on the person of the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff, and an indignity to his feelings for which an action will lie, and for which he is entitled to be compensated in damages. Such is the well settled law of this State and of this country. The mistake by which the plaintiff's ticket was cancelled was the mistake of the appellant's servant, and it must abide the consequences. There was no error, therefore, in the rulings of the Court in this respect.

But in addition to damages for the unlawful interference with the person of the plaintiff and the indignity to his character and feelings, the Court also instructed the jury that if he was *maliciously* or *wantonly* ejected from the train, he was entitled to recover *exemplary damages* as a *punishment* to the appellant. Now we have not been able to find a particle of evidence from which the jury could find that the plaintiff was wantonly or maliciously ejected from the car. The ticket which he handed to the conductor, Mattison, was a cancelled ticket, one which upon its face showed it had been used. It had been cancelled, it is true by the mistake of another conductor; but this mistake had not been corrected according to the rules of the company. Mattison could not therefore recognize it as a ticket entitling the plaintiff to the trip to Wilmington, and if the latter refused to pay his fare or to leave the car, the conductor was obliged to eject him forcibly. The proof shows the conductor acted in good faith, and in obedience to the rules of the company, and that no greater force was used than was actually necessary. No complaint is made by the plaintiff in his testimony of unnecessary force, or that any abusive language was used. The brakeman, he says, "put his hand on his shoulder, and pulled him across the person who was sitting by him;" at first he made up his mind to resist; but upon the advice of friends he concluded to go out without further resistance. The testimony of his friends Friedenrich and Hobbs is to the same effect. Hobbs says, the manner "of the conductor and brakeman was firm and decided; they looked angry." This is the evidence on the part of the plaintiff to support the claim for punitive damages, damages as a punishment to the appellant for having acted in bad faith, or maliciously, or wantonly, or in a spirit of oppression. The case, it seems to us, is wanting in every element necessary to entitle the plaintiff to vindictive damages. Camp, a passenger, who saw and heard all that took place says, "the conductor told the plaintiff he must have all the tickets regular, and hoped he would not think hard of him;

his orders were imperative, and he was only doing his duty. The brakeman put his hand gently on plaintiff's shoulder and he went out without resistance; all the parties," witness thought "acted like gentlemen."

This case comes before us a second time, and we naturally feel some reluctance in sending it back for another trial. But as there is no evidence from which the jury could reasonably find that the plaintiff was *wantonly* or *maliciously* put off the train, the Court erred in granting the plaintiff's third prayer, by which the question of *punitive damages* was submitted to the finding of the jury.

Judgment reversed, and new trial awarded.

BRADSHAW *v.* SOUTH BOSTON RAILROAD COMPANY.

SUPREME COURT OF MASSACHUSETTS, 1883.

[135 *Mass.* 407.]

TORT for being expelled from one of the defendant's cars.

C. ALLEN, J. It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract to give him a check showing that he was entitled to travel in the second car, and that it failed to do so; in consequence of which he was forced to leave the second car. It does not appear that the defendant had any rule requiring conductors to eject passengers under such circumstances. We may, however, take notice of the fact that it is usual for passengers to provide themselves with tickets or checks, showing their right to transportation, or else to pay their fare in money. It was the practice for passengers on the defendant's road to receive and use such checks; and the plaintiff intended to conform to this practice.

The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at

the end of the trip; and even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car.

This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary. Judgment for the defendant.

THE PEOPLE *v.* MANHATTAN GAS LIGHT CO.

SUPREME COURT OF NEW YORK, 1865.

[45 *Barb.* 136.]

APPEAL from an order made at a special term, denying an application for a *mandamus* commanding the defendants to supply the plaintiff with gas, at his house, No. 121 West Sixteenth Street, New York.

By the court, INGRAHAM, P. J. I think there can be no doubt about the authority of this court to direct the respondents to furnish gas to persons who, under the provisions of their charter, have a right to receive it and who offer to comply with the general conditions on which the company supply others.

They possess, by virtue of their charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants.

We are left then to inquire whether the relator was in a condition to demand from the company this supply. It appears by the papers used on the motion that the relator commenced taking gas in 1858, at No. 61 in Seventh Avenue, and was supplied with gas by the company, until 28th of December, 1861. That he paid for the gas so received up to 19th of August, 1861, and that for gas furnished after that date he has not paid. It also appears that in January, 1865, the respondent sued the relator and obtained a judgment against him for the amount due therefor, which still remains unpaid. In May, 1864, the relator applied to the company for gas at 121 West Sixteenth Street, which was furnished to him by the company, without objection on account of the former indebtedness, until 9th of February, 1865, when the company shut off the supply of gas and refused to furnish any more. It also appears that the relator in answer to a claim for payment of this indebtedness, represents himself as insolvent and unable to pay the judgment.

There is nothing in the charter of the company which requires them to make the objection that the applicant was indebted to them at the time of the first application. It would be unreasonable to suppose that in every instance they could ascertain such indebtedness. If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so when the relator avows his insolvency and his inability to pay for gas furnished previously.

The attempted denial of liability for this bill, by the relator, will not aid him. The company have obtained a judgment against him. This is not disputed, and no attempt is made by him to set it aside. So long as that remains in force it is conclusive against him.

The order appealed from should be affirmed, with $10 costs.[1]

[1] *Accord:* Montreal Gas Co. *v.* Cadieux, 1899, A. C. 589; Shiras *v.* Ewing, 48 Kans. 170; Gas Co. *v.* Storage Co., 111 Mich. 401; McDaniel *v.* Waterworks, 48 Mo. 273; Turner *v.* Water Co., 171 Mass. 330; Ins. Co. *v.* Philadelphia, 88 Pa. St. 393; Hotel Co. *v.* Light Co., 3 Wash. 316. — ED.

STATE *v.* NEBRASKA TELEPHONE CO.

SUPREME COURT OF NEBRASKA, 1885.

[17 *Neb.* 126.[1]]

REESE, J. This is an original application for a *mandamus* to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice.

It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterwards the relator applied to the agent of the respondent and requested to become a subscriber and to have an instrument placed in his place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist.

We cannot see that the relations of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits, will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.

The pleadings and proofs show that the relator is an attorney-at-law in Lincoln, Nebraska. That he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in southeastern Nebraska. That this territory is occupied by respondent exclusively, together with a large portion of

[1] This opinion is abridged. — ED.

southwestern Iowa, including in all about fifteen hundred different instruments.

By the testimony of one of the principal witnesses for respondent we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the State, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the State, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity — patented as it is — should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist in many cases sufficient reason for failing to comply with such a demand, but they are not shown to exist in this case. It is shown to be essential to the business interests of relator that his office be furnished with a telephone. The value of

such property is, of course, conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there. That, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations, that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send despatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public.

That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when those principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from

the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone; "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

A peremptory writ of *mandamus* must be awarded.[1]

STATE *v.* CAMPBELL.

SUPREME COURT OF NEW JERSEY, 1867.

[32 *N. J. Law*, 309.[2]]

THE CHIEF JUSTICE. . . . To make intelligible the application of the law to the case, the circumstances must be understood. They were these: the passenger who was expelled had purchased, at the depot in New York, this ticket, which he produced and showed, for the first time, on the platform at the station at Newark. At the time that he provided himself with it, he expected to have trouble with the conductor, as it was then his intention to insist on his right to use the return ticket, which was spent. Being called on by the conductor, on two several occasions, to show his ticket, he produced the spent one, keeping the other out of view, so that the conductor was not aware of its possession by him, while he remained in the cars. Having arrived at the Newark station, he was informed he must pay his fare or leave the cars. He refused to do either act. The conductor then declared his intention to delay the train until the passenger paid his fare or left the cars, and accordingly he sent back a flag, to warn a train that was nearly due at Newark. This produced excitement; and when the employees of the company were called in, the acquaintances of the recreant passenger collected around him and endeavored to prevent his being put out. The passenger himself resisted by clinging to the seats. After a delay of twelve minutes he was ejected. During this time the other train, which had been warned of the danger, arrived.

It is presumed that no person will deny that here was a transaction which, if often repeated, would deprive railroad travel of some of its security and much of its comfort. The annoyance and danger to be apprehended from such an affair, are too obvious to need exposition. It is clear, therefore, that some person was to blame. That person was certainly not the company or its agents. The company, through its

[1] *Accord:* Smith *v.* Water Works, 104 Ala. 315; Crow *v.* Irrigation Co., 130 Cal. 311; Lloyd *v.* Gas Co., 1 Mackey, 131; Gas Co. *v.* Calliday, 25 Md. 1; Bank *v.* Lowell, 152 Mass. 556; Wood *v.* Auburn, 87 Me. 287; Water Works *v.* State, 46 Neb. 194; Crumley *v.* Water Co., 99 Tenn. 420. — ED.

[2] This opinion is abridged. — ED.

agents, simply enforced a plain legal right in a legal mode. The whole fault must be laid to the passenger; and the only question which can possibly arise is, whether his conduct was such as to justify the conductor in refusing him re-admission into the cars. The proposition is simply this: if a passenger refuses to show his ticket on a legal demand made, and refuses to leave the cars on request, and is put out, after resistance, has he, as a matter of law, the privilege to return to the cars upon the production, at this stage of the occurrence, of his ticket? This proposition must be answered in the affirmative, in order, in this case, to hold that the defendant was guilty of a wrong. In my opinion, such a doctrine is not consistent with either law or good sense. Its establishment would, practically, annul the power of a railroad company to require passengers to show their tickets; for it is obvious, that if the only penalty on a refractory passenger is a momentary expulsion, he will be enabled, at a small sacrifice, by repeated refusals, to compel an abandonment of the demand upon him. A passenger takes his ticket subject to the reasonable regulations of the company; it is an implied condition in his contract, that he will submit to such regulations; and if he wilfully refuses to be bound by them, by so doing he repudiates his contract, and after such repudiation cannot claim any right under it. In this case, the passenger, with full knowledge of the regulation in question, refused to show his ticket, which alone gave him the right to a seat in the cars. The exhibition of the spent ticket did not help the matter; he stands, therefore, on the same footing as any other passenger who, when properly applied to, will not exhibit the evidence of his rightful presence in the car. If this particular passenger had the legal right to re-enter the cars after his tortious refusal, so, on all similar occasions, will all other passengers be entitled to the same right. We come thus to the result, that railroad passengers may violate, with full knowledge, a legal regulation of a company in whose cars they are carried; they may resist, short of a breach of the peace, all attempts to expel them; they may, by this means, at a loss to the company and to the peril of the public, disarrange the order of successive trains upon the road, with regard to each other; they may occasion a tumult and disorder in the car in which they may happen to be; and, after being expelled, they may immediately return to repeat, if so inclined, the same misconduct. I must think it requires no argument to show that such a license to do evil as this does not exist. The defendant was entirely justified in forming the rational conclusion, that the passenger in question, if re-admitted into the cars, would again misconduct himself; and, under such circumstances, it was his duty to exclude him.

The Court of Oyer and Terminer should be advised to set aside the verdict.

PENNINGTON *v.* PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD CO.

SUPREME COURT OF MARYLAND, 1883.

[62 *Md.* 95.[1]]

BRYAN, J., delivered the opinion of the court.

The appellant purchased from a ticket agent of the appellee a ticket of which the following is a copy.

Excursion Return Check.

PHILA. WILM. and BALTO. R. R.

(*One Continuous Passage.*)

PERRYMAN'S to BALTIMORE.

In consideration of the reduced rate at which the ticket is sold, it is agreed that it shall be used within three days, including the day of sale, for a continuous trip only, and by such trains as stop regularly at the station, and by its acceptance the purchaser becomes a party to and binds himself to a compliance with these conditions.

(1,723)

GEO. A. DADMUN,
General Ticket Agent.

On the back of the above ticket is the following stamp, to wit:

Phila. Wilm. and Balto. R. R.
Dec. 13, 1882.
Baltimore.

7 v. 62.

He proceeded in appellee's cars to Perryman's on the thirteenth day of December, 1881, and while attempting to return on the sixteenth day of December, the conductor refused to receive the ticket for his passage and required him to leave the cars. The controversy depends upon the rights acquired by the purchase of the ticket. The plaintiff, at the trial below, offered to prove that before he purchased the ticket, he was informed by the agent, upon inquiry from him, that it was "good until used."

We think that the plaintiff's rights in this regard are limited by the ticket. There is no evidence in the record that the ticket agent was authorized to make any contracts for the railroad company, or that he had any duties beyond the sale and delivery of the tickets. The ticket purchased by the appellant clearly informed him that he would have no right to use it after the fifteenth, and the agent had no authority to vary its terms.

A passenger has a right to be conveyed in the cars of a railroad company without making any special contract for transportation. Upon payment of the usual fare, the company is bound to convey him, and is under all the obligations imposed by law on common carriers, so far as they relate to the transportation of him as a passenger. It is competent to vary these obligations by a special agreement, on valu-

[1] Opinion only is printed. — ED.

able consideration, between the passenger and the company. But if the passenger chooses to do so, he may stand on his legal rights, and elect to be carried to his destination without making any special contract. The mere purchase of a ticket does not constitute a contract. Before the ordinary liability of the railroad company can be varied, there must be a consent of the passenger, founded on valuable consideration. The ticket ordinarily is only a token, showing that the passenger has paid his fare. But where the ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract. It is true, he pays his fare before he receives the ticket, but if he has been misled or misinformed by the seller of the ticket, as to its terms, he has a right to return the ticket and receive back his money. The railroad company agrees to carry him at the reduced rate, upon the conditions stated on the face of his ticket; if he agrees to those terms the contract is consummated; but he cannot take advantage of the reduction of the rate and reject the terms on which alone the reduction was made.

In this case the plaintiff made the journey to Perryman's, under the terms mentioned in the ticket. There was evidence that he did not read the ticket. He used it and thereby availed himself of the advantage conferred by the diminished rates. He had an ample opportunity to read it if he had chosen to do so. He could not, on any principle, hold the railroad company to any terms except those stated. If there was a contract, these terms were embraced in it, if there was no contract, he had no right to the reduction in the fare. After availing himself of this reduction, it was too late for him to allege that he did not know on what terms the reduction was made; when he had an ample opportunity of learning them from the ticket in his possession.

The plaintiff was required to leave the cars at Back River Station, on his journey back to Baltimore from Perryman's. After he had left the cars and while on the platform he offered to pay the conductor his fare from that station to Baltimore, but the conductor refused to give him admission to the cars. The plaintiff had already accomplished a portion of the return journey to Baltimore without paying his fare. He clearly was not entitled to be conveyed from Perryman's to Baltimore without paying fare for the whole distance. If he had been carried from Back River Station to Baltimore, on payment of the fare only from that place, he would have escaped payment of a portion of the fare; and so, in fact, he would have accomplished the return trip at a reduced rate. The company was under no obligation to carry him for less than the full rate for the whole distance, and so he was properly excluded from the cars. The judgment must be affirmed.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. *v.* McGUIRE.

SUPREME COURT OF INDIANA, 1885.

[104 *Ind.* 130.]

ELLIOTT, J. The complaint seeks a recovery of the statutory penalty for a failure to transmit a telegraphic message. The answer of the appellant is substantially as follows: "The defendant says that it did fail and refuse to transmit the message set forth in the complaint, but defendant says that the plaintiff was a stranger in Frankfort and a transient person therein; that the said message was one that required an answer; that the defendant has, and had at the time, as one of its general rules and regulations of business, regularly adopted for the government of the operators and agents of said company, the following rule: 'Transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words. In such case the signal, "33" will be sent with the message, signifying that the answer is prepaid;' that the defendant's agent to whom said message was offered, informed the plaintiff of the existence of said rule and what said rule was, and that the amount required to be deposited was twenty-five cents; that thereupon the plaintiff refused to comply with said rule and make said deposit."

To this answer a demurrer was sustained, and on this ruling arises the controlling question in the case.

One of the incidental and inherent powers of all corporations is the right to make by-laws for the regulation of their business. There is no conceivable reason why telegraph corporations should not possess this general power; nor is there any doubt under the authorities that this power resides in them. Western Union Tel. Co. *v.* Jones, 95 Ind. 228 (48 Am. R. 713), *vide* opinion, p. 231, and authorities cited; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429 (9 Am. R. 744); True *v.* International Tel. Co., 60 Maine, 9 (11 Am. R. 156); Scott & J. Law of Telegraphs, section 104.

Affirming, as principle and authority require us to do, that the telegraph company had power to make by-laws, the remaining question is whether the one under immediate mention is a reasonable one. It is established by the authorities that an unreasonable by-law is void. Western Union Tel. Co. *v.* Jones, *supra;* Western Union Tel. Co. *v.* Buchanan, *supra;* Western Union Tel. Co. *v.* Adams, 87 Ind. 598 (44 Am. R. 776); Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299 (45 Am. R. 480, see authorities note, pages 491, 492).

It is for the courts to determine whether a by-law is or is not an unreasonable one, and this is the question which now faces us. 1 Dillon Munic. Corp. (3d ed.), section 327; Scott & J. Law of Telegraphs, section 104.

We are unable to perceive anything unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services. It is not unnatural, unreasonable, or oppressive for the telegraph company to take fair measures to secure payment for services rendered, and in requiring a transient person to deposit the amount legally chargeable for an ordinary message, it does no more than take reasonable measures for securing compensation for transmitting the asked and expected message.

We have found no case exactly in point, but we have found many analogous cases which, in principle, sustain the by-law before us. Western Union Tel. Co. *v.* Carew, 15 Mich. 525; Camp *v.* Western Union Tel. Co., 1 Met. Ky. 164; Vedder *v.* Fellows, 20 N. Y. 126; Ellis *v.* Am. Tel. Co., 13 Allen, 226; McAndrew *v.* Electric Tel. Co., 33 Eng. L. & Eq. 180; Western Union Tel. Co. *v.* Blanchard, *supra*, see authorities cited note, 45 Am. R., page 489; Western Union Tel. Co. *v.* Jones, *supra*.

Judgment reversed, with instructions to overrule the demurrer to the answer and to proceed in accordance with this opinion.

OWENSBORO GASLIGHT CO. *v.* HILDEBRAND.

COURT OF APPEALS OF KENTUCKY, 1897.

[42 *S. W. Rep.* 351.]

HAZELRIGG, J. The Owensboro Gaslight Company and the Owensboro Electric Company are not given, in express terms, exclusive right to manufacture and furnish gas in the city of Owensboro, but the companies are given the use of the streets and public ways of the city for the purpose of laying the mains and pipes and other appliances in the maintenance of its work. The companies may also acquire the use of lands for their business by writs *ad quod damnum*. Their business, therefore, is affected with public interest, and they are quasi-public corporations, and practically they have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city. It is therefore their duty to furnish the city's inhabitants with gas, and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices, or impose different terms and conditions, according to their caprice or whim. They

may, however, fix reasonable rules and regulations applicable to all the consumers alike. In these cases the companies undertook to compel the appellee to deposit the sum of twenty dollars as security for his future consumption of gas and electricity, and upon his refusal to do so, withdrew their pipes and wires from his building. This suit by appellee was to compel them to furnish him light, and the court, on final hearing, granted the relief sought. It is conceded by appellee that appellant may prescribe reasonable rules and regulations, and impose reasonable conditions upon the consumer, and require proper security for the payment of their bills, and may even require deposits in advance; but his contention here is that the companies have adopted no such rule or regulations as they have attempted to enforce against him, and such appears to us to be a fact. No rule or regulation of a general character is relied on or exhibited by the companies, and to allow them to select this or that consumer against whom to enforce special rules would put the consumer at the capricious humor of the agents and employees of the companies.

The judgment below is affirmed.

STATE EX REL. WEISE *v.* THE SEDALIA GAS LIGHT CO.

COURT OF APPEALS, MISSOURI, 1889.

[34 *Mo. App.* 501.[1]]

STATEMENT of the case by the court.

The petition avers, and the alternative writ recites, that the appellant was organized under the general laws of the State of Missouri for the purpose of supplying the city of Sedalia and its inhabitants with illuminating gas; that by section 14 of said article 7 (Wag. Stat.) said company might lay its pipes, &c., through the streets of said city, by consent of the municipal authorities thereof, under such reasonable regulations as said authorities might prescribe; that on the seventeenth day of June, 1868, an ordinance was passed by the municipal authorities of said city granting to said company the exclusive right to lay its pipes through said city, and to supply it and its inhabitants with gas, for a period of thirty years, upon the sole condition, however, that said company should furnish the city and its inhabitants "a good article of illuminating gas, at a price per cubic foot, not exceeding the rate charged in similarly situated places;" that said company accepted the terms of said ordinance; that the relator complied with all the reasonable rules and regulations of said gas company, which are fully set forth in the petition and alternative writ; that notwithstanding all this, and relator's offer and tender of full pay for all gas con-

[1] This case is abridged. — ED.

sumed, the gas company removed the meter from his place of business and refused to furnish him gas, &c.

All this is admitted in respondent's return to the alternative writ, and the sole justification pleaded, for its refusal to furnish gas to relator, is that, in addition to the rules and regulations set out in the petition and alternative writ, said gas company had adopted another to the effect that, "all persons using or desiring to use gas manufactured by the defendant within said city, should pay a monthly rental upon, and for the use of, the meter furnished by the defendant of the sum of one dollar and twenty-five cents per month, in all cases where such consumer consumes less than five hundred feet of gas, and which rental was to be taken in full of such gas, not exceeding the amount of five hundred feet in any one month." Thereupon relator moved to strike out that part of the return for the following reasons:

I. The rule, regulation or by-law, in said portion of said return set up and pleaded as a reason why a peremptory *mandamus* should not issue against defendant herein, is not a fair, impartial nor reasonable rule or by-law; it is oppressive and discriminatory and contrary to public policy; it is beyond the power of the defendant to make and seeks to enlarge the powers of defendant, granted it by the laws of the State; it is in conflict with the ordinance of the city of Sedalia, as set forth in the alternative writ, under which it supplies the city of Sedalia and its inhabitants with illuminating gas.

II. Said portion of said return states no facts which in law constitute good cause why the defendant should not obey the mandate of the alternative writ issued herein.

This motion was sustained. The respondent refused to plead further, and the return, after this portion being stricken out, being in effect a concession of the recitations of the alternative writ, a peremptory writ was ordered.

The sole ground of error is the action of the court in striking out said portion of respondent's return.

GILL, J. I. It is a well-understood principle that corporations, so engaged as the appellant gas company, may, in its dealings with the people, adopt and enforce such reasonable and just rules and regulations as may be necessary to protect its interests and further the designs of its incorporation. They have such power, too, without an express grant to that effect. It is an inherent power implied from the nature of the business in which they are engaged, limited only by express statute, or ordinance, or by a sense of what is right, reasonable, and just. Shepard *v.* Gas Co., 6 Wis. 539; Wendall *v.* State, 62 Wis. 300.

The relator in this action contends, however, that the rule, or regulation, of the Sedalia Gas Company prescribing payment by the consumer of $1.25 per month, where the amount of gas used is less per month than five hundred cubic feet — the designated $1.25 per month being denominated rent of meter — is "unjust, unreasonable, and dis-

criminatory." What is just and reasonable is to be determined by the nature of the employment pursued by the corporation and the uses and conveniences of the public. There must be a reasonable protection of the interests of the one, consistent with the reciprocal rights of the other.

Irrespective, now, of any ordinance provision, can it be said that this charge of $1.25 per month on a consumer of less than five hundred cubic feet of gas is unreasonable? We think it is not unjust or unreasonable. The evident purpose of this rule was to exact fair compensation from those requiring gas connection, and gas furnished at hand, though the amount consumed should be very small, almost nominal.

It is a matter of common knowledge, that to furnish the gas at hand for the very small or nominal consumer requires the same out-lay, in the way of a meter, periodical inspection and repairs, with weekly or monthly visitations, that is required of very large consumers. The same investment and the same care and oversight is required where the gas monthly consumed shall not exceed ten cubic feet or even one cubic foot, as where the amount used may be ten thousand cubic feet. At the rate charged then in Sedalia, as alleged in relator's complaint, the gas company would be required to invest and expend, for the benefit of this merely nominal consumer, more dollars than cents received. The rate there charged, as alleged, is $2.50 per thousand cubic feet. For this ten cubic feet thus consumed, and for which the company could receive pay of only two and a half cents, the cost to the gas company may be many dollars.

II. Relator's further contention is that the gas company has no authority, under the ordinance of the city, under which it operates, to adopt or enforce the rule in question.

Much courage for this contention is apparently drawn from the terms of the grant of franchise, by the city, wherein it is provided that the grant should be "upon condition that it (the gas company) should furnish the public lamps of the city, and to the inhabitants of the city . . . gas at a price, per cubic foot, not exceeding the rate charged in similarly situated places; that said gas company should have the right to collect pay for gas furnished from the consumers of the same," &c.

It is insisted that this is not collecting for "gas consumed," but is charging rental on the meter used in measuring the gas, and that the company is only allowed to charge for gas per cubic foot.

The construction insisted on is too narrow. While the rule names the charge for gas in this instance as "rent" of meter, yet by its express terms the $1.25 is pay for all gas consumed by the customer, to the extent of five hundred cubic feet. And again the clause limiting the maximum price at which the company should sell its gas to the city for street lamps and to its citizens was only intended to require of the company to furnish gas to Sedalia, and to its inhabitants, at prices not exceeding those prevailing in other "places similarly situated." It

was not meant to prohibit the gas company from selling gas by any other means than per cubic foot. If the company shall furnish gas to the city, and to its inhabitants, at prices not in excess of those charged in "places similarly situated," than the spirit of this ordinance provision is fully met; and if the gas company by this rule is charging more than is imposed in "places similarly situated," then the provisions of the ordinance in question are being violated, and the company will not be protected in so doing. We think this is a fair construction to be given the clause in question. To hold otherwise would impose upon the gas company the necessity to affix a meter on every lamp post in the city, and measure off each cubic foot furnished the city; for the same stipulation implies to gas furnished the street lamps as is furnished private consumers.

We hold then that the rule or regulation in question, and as is stated in the return to the writ, is not, as a matter of law, unreasonable, and does not conflict with the terms of the franchise ordinance referred to, and, admitting the truth of that portion of the return as pleaded, the trial court, in our opinion, committed error in striking out the same, as it was proper matter of defence to the action.

Judgment reversed and cause remanded.

The other judges concur.

WATAUGA WATER CO. *v.* WOLFE.

SUPREME COURT OF TENNESSEE, 1897.

[99 *Tenn.* 429.]

CALDWELL, J. C. H. Wolfe brought this suit against the Watauga Water Company and obtained judgment before the circuit judge, sitting without a jury, for ten dollars, as damages for its refusal to furnish him water at his residence in Johnson City. The company appealed in error.

The defendant is a water company, chartered under the general laws of the State (Code, annotated by Shannon, §§ 2499–2506), with the right of eminent domain and all essential powers, privileges, and franchises, and operating its waterworks at Johnson City under special contract with that city to furnish it and its inhabitants with water at designated rates. Being thus endowed by the State, and under contract with one of the State's municipalities, the company is essentially a public corporation, in contradistinction from a private corporation. It is engaged in a public business, under a public grant and contract, and is, therefore, charged with public duties, and cannot, at its election and without good reason, serve one member of the community and not another. It is bound to furnish the commodity, which it was created to supply, to the city and all of its inhabitants upon the terms desig-

nated in its contract (the same being fair and reasonable), and without discrimination. Crumley *v.* Watauga Water Co., 98 Tenn. 420; Hangen *v.* Albina Light & Water Co. (Ore.), 14 L. R. A. 424; American Waterworks Co. *v.* State (Neb.), 30 L. R. A. 447; State *v.* Butte City Water Co. (Mont.), 32 L. R. A. 697; Union Tel. Co. *v.* State, 118 Ind. 206; Lombard *v.* Stearns, 4 Cush. 60; Lowell *v.* Boston, 111 Mass. 464; Williams *v.* Mut. Gas Co., 52 Mich. 499; 50 Am. Rep. 266; Olmsted *v.* Morris Aqueduct Proprs., 47 N. J. Law, 333; Shepard *v.* Milwaukee Gas Co., 6 Wis. 539; 70 Am. Dec. 479; Spring Valley Waterworks *v.* Schottler, 110 U. S. 347; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; 2 Mor. on Pri. Corp., Sec. 1129; 2 Cook on S. S. & C. L., Sec. 932; 1 Dill. on Mun. Corp. (4th ed.), Sec. 52, and note, citing Forster *v.* Fowler, 60 Pa. St. 27; 29 Am. & Eng. Enc. L. 19, note; 15 L. R. A. 322.

Though impressed with a public use, and under legal obligation to furnish water to all inhabitants at the designated rates, and without discrimination, the defendant company is allowed to adopt reasonable rules for the conduct of its business and operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company, even to the extent of denying water to those who refuse to comply with them. American Waterworks Co. *v.* State (Neb.), 30 L. R. A. 447.

Wolfe had been a patron of the company, and had been accustomed to leave his hydrant open, so that large quantities of the escaping water went to waste. His claim was, that the water so wasted was stale and not fit for his use, and upon that ground he sought to justify his action; but the company thought the water not stale and the waste excessive. Complaints were made to the company by persons upon whose premises the escaping water flowed.

Wolfe ceased to take water from the company for awhile, preferring to use his well. When he applied to the company for water again, tendering all required charges in advance he was requested to sign a regular application, and agree, in conformity to a rule of the company, that he would keep his hydrant closed except when using the water. This he declined to do, and the company refused to turn water into his hydrant. He said he "wanted pure, good water," and that he "would keep the tube open so long as it was necessary to keep the water fresh." Three days after the company's declination this suit was brought to recover damages. The rule in question was reasonable, and Wolfe's refusal to comply with it disentitled him to receive the water, and relieved the company of its obligation to furnish it. This does not imply that a patron of a water company is not entitled to "pure, good water," but only means that he may not set himself up as the sole judge of its quality, and execute his own adverse judgment in his own way, and without restraint, in defiance of the company, and to its inevitable detriment. It has been held, that "a rule of a water

company, giving it the right to shut off water from the premises of a consumer who wastes it, is reasonable" (Shiras *v.* Ewing, 48 Kan. 170); and that holding was approved in the case of American Waterworks Co. *v.* State, 30 L. R. A. 449.

Reversed, and enter judgment dismissing suit with costs.

HARBISON *v.* KNOXVILLE WATER CO.

COURT OF CHANCERY APPEALS OF TENNESSEE, 1899.

[53 *S. W. Rep.* 993.]

THIS bill was filed February, 1899, to enjoin the defendant from cutting off the water supply for domestic purposes from the premises occupied by complainant, and to secure a mandatory injunction commanding defendant to furnish complainant water for the purpose stated, without requiring him to comply with certain of its rules and regulations, characterized in the bill as oppressive and unreasonable. The bill, after stating the location of the premises occupied by complainant, and that the defendant was a corporation organized under the laws of this State for the purpose of supplying water to the city of Knoxville and its inhabitants, avers that, having been given the rights to lay its pipes, &c., in the streets and alleys of the city of Knoxville, it is a public corporation, and engaged in a public business. The bill further avers that complainant, soon after he occupied the premises described, commenced taking water from the defendant for domestic purposes, and continued to get water from it until May, 1899, paying in advance therefor, under the rules of the company; that the hydrant or pipe from which complainant obtained his supply of water was located in his yard, adjacent to his house, and that in May, 1898, he, at his own expense, had a faucet put upon his hydrant, and began to use water for sprinkling his yard and the street adjacent thereto; that for water thus used he paid the additional charges exacted by the company, and continued to use water for both domestic and sprinkling purposes until January 1, 1899; that at this date he called at the office of the company in Knoxville, and informed its officers that he did not desire to take water for sprinkling purposes, but did desire to take water for domestic purposes, and offered then to pay its charges for water to be thus used; that his reason for not wishing the water for sprinkling purposes was that during the winter and spring seasons nature's rains furnished the water free of charge, and he had no need of an artificial supply for sprinkling purposes. . . . The bill further states that the defendant, February 1, 1899, cut off his domestic supply of water altogether from his premises, because he would not pay its unjust charges in advance. It is alleged that complainant's sole reliance

for water is upon the defendant, and that, if it is allowed to cut off the supply, he will be put to great cost, expense, and annoyance in providing himself with the water necessary for cooking, washing, and other domestic purposes. It is said in the bill that complainant is now compelled, in order to supply himself with water for domestic purposes, to get the same from his neighbor's cistern, across the street from him. The charges of the defendant for water for domestic purposes are tendered with the bill. The complainant, however, denies the right of the defendant to cut off his water supply because its charges therefor were not paid in advance. He also denies the right of the defendant company to exact from its patrons, as a condition precedent to furnishing them with water, its price or charges for said water for three months in advance, or for any other period in advance. The rules and regulations of the company in this regard are assailed as unjust, oppressive, and unreasonable. The prayer of the bill is for an injunction compelling defendant to abstain from cutting off the water supply of complainant for domestic purposes, and for a mandatory injunction compelling defendant to furnish complainant water. A decree is also asked establishing and declaring complainant's rights in the premises, under the facts, and especially for a decree compelling the defendant to furnish complainant water for domestic purposes without requiring him to injure, remove, or destroy the pipe or faucet placed by him upon his hydrant, and without requiring him to take and pay for the water for the entire season as fixed by defendant, and without requiring him to pay in advance therefor. The rules of the company exacting these requirements are asked to be set aside, as unreasonable and oppressive, and as beyond the power of defendant to establish. An injunction issued under the prayer of this bill.

The defendant water company answered the bill in full.

Chancellor Kyle heard the case upon the whole record August 3, 1899. He held that the complainant was not entitled to the relief sought in his bill, nor to any relief, and thereupon dismissed the bill, with costs. The defendant thereupon moved the court for a reference to the master to ascertain and report the damages due the defendant, sustained by reason of the injunction sued out. The court, however, was of opinion that this reference should not be executed until after the hearing of the appeal prayed by the complainant. The complainant prayed and was granted an appeal to the Supreme Court, and has assigned errors. The errors assigned are: First. Error in dismissing the bill of complainant and in denying him relief. Second. Error in the chancellor in refusing to decree that the defendant could not, as a condition precedent to furnishing the complainant water for domestic purposes only, require him to remove or cut off the threads from the nozzle of his hydrant. Third. Error in not holding that the defendant had no right, as a condition precedent to furnishing water for domestic purposes, to require him to pay for water for both domestic and sprinkling purposes in advance. Fourth. Error in not holding that the defendant had no

right, as a condition precedent to furnishing complainant water for sprinkling purposes, to require him to take and to pay for the same for an entire season, extending from April to November of each season. Fifth. Error in not holding that defendant's rules, under and by virtue of which it assumed the right to do the things above complained of, were unjust, oppressive, harsh, unreasonable, and illegal.[1]

WILSON, J. The law is well settled that water companies organized and invested with the powers given the defendant company, and obligated to furnish cities and their inhabitants with water, are in the nature of public corporations, engaged in a public business, and are charged with the public duty of furnishing to the cities and their inhabitants water, alike, and without discrimination and without denial, except for ground, and upon sufficient cause. It is equally well settled that such companies, while thus charged and obligated, may adopt reasonable rules for the conduct of their business and the operation of their plants, and such rules are binding on their patrons, and may be enforced, even to the extent of denying water to those who refuse to comply with them. In support of these propositions, we need only refer to the cases of Crumley *v.* Water Co., 99 Tenn. 420, 41 S. W. 1058 *et seq.*, and Water Co. *v.* Wolfe, 99 Tenn. 429, 41 S. W. 1060 *et seq.* and the opinions therein prepared by Mr. Justice Caldwell, where numerous authorities are referred to and commented on. In these cases the rule is announced that a water company cannot refuse to furnish water, upon the tender of its charges therefor, on the ground that the applicant is indebted to it for a previous supply of water, which he refuses or is unable to pay for. It is further announced in the latter of the cases that a regulation of the company requiring patrons to keep their hydrants closed, except when using the water, is reasonable, and that a refusal to comply with this rule of the company justifies it in refusing to supply water to the party so refusing, although under legal obligation to do so upon his compliance with its reasonable regulations. The question, therefore, in every case of this character, is the reasonableness or unreasonableness of the rule assailed by the citizen asking for a supply of water, and invoked by the company in justification of its refusal to furnish it. The rules of the company assailed in this case are, in brief: (1) That the citizens shall pay in advance for a quarter of a year for a supply of water for domestic purposes; (2) that, if the citizen take water for sprinkling purposes, he must do so for the season in each year fixed by the company (that is, from April 1st to November 1st), and pay for the same in advance; (3) that the company will not furnish water for domestic purposes, although its charges therefor for the quarter are tendered in advance, unless the applicant also takes water for sprinkling purposes, if the application come in the sprinkling season fixed by it, or unless the applicant removes the appliances of his hydrant, or puts it in such con-

[1] This statement of facts is taken from the statement of WILSON, J. — ED.

dition that he cannot use it to get water for sprinkling purposes. In Tacoma Hotel Co. *v.* Tacoma Light & Water Co., 3 Wash. 797, 28 Pac. 516, 14 L. R. A. 669, a rule requiring a deposit of money to guarantee the payment of the price of gas used, and authorizing the company to discontinue furnishing gas unless the rule was complied with, was held to be reasonable. In Shiras *v.* Ewing, 48 Kan. 170, 29 Pac. 320, a rule of the water company to shut off the supply of a patron who wastes it was upheld as reasonable. In People *v.* Manhattan Gaslight Co., 45 Barb. 136, the rule of the gas company giving it the right to refuse to furnish a customer with gas until he paid his past-due gas bills was held not unreasonable. The holding of the case last cited, we take it, is in conflict with the rule announced in Crumley *v.* Water Co., *supra*. The above principle announced in the New York case is also repudiated in the case of Gaslight Co. *v.* Colliday, 25 Md. 1. See, also, Lloyd *v.* Gaslight Co., 1 Mackey, 331. The case of Shepard *v.* Gaslight Co., 6 Wis. 539, and extended note thereto, give a full and clear statement of the law applicable to the duties and powers of gas companies, whose relations to the public are closely analogous to water companies chartered to supply cities and their inhabitants with water. In this case it was held that the gas company had the right to make such needful rules and regulations for its own convenience and security, and for the safety of the public, as are just and reasonable, and to exact from the consumer of its product a promise of conformity thereto. Under this general principle, it was held that the company had the right to demand security for the gas consumed, or a deposit of money to secure payment therefor. A rule of the company, however, requiring the citizen to agree to free access to his house and premises at all times by the inspector of the company for the purpose of examining the gas appliances, and to remove the meter and service pipe, was held to be too general in its scope, and therefore unreasonable and beyond the power of the company to enforce. A rule of the company reserving to it the right at any time to cut off the communication of the service whenever it found it necessary or deemed it necessary to do so, to protect its works against abuse or fraud, was also held to be unreasonable. In this connection the court said that the company must rely for protection against fraud upon the same tribunals that the law provides for individuals. It was further adjudged in the case that the company had no power to impose a penalty for the violation of one of its regulations, and that it had no right to make submission to such penalty a condition precedent to the right of the citizen to be furnished with gas. See, also, the following additional cases for further illustration of the general rule, and its application to particular instances: American Water Works Co. *v.* State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; Williams *v.* Gas Co., 52 Mich. 499, 18 N. W. 236; State *v.* Nebraska Tel. Co., 17 Neb. 126, 22 N. W. 237; City of Rushville *v.* Rushville Nat. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321, note, and cases cited; Water Co. *v.* Adams, 84 Me. 472, 24

Atl. 840, and cases cited. In the case last referred to it was ruled that a regulation of the water company, that one year's rent would be required in all cases, payable in advance, on the 1st day of July each year, was unreasonable and could not be enforced, and therefore a year's rent could not be collected from a party who had used water only for a few months. It was further ruled in that case that a contract to pay for water according to the regulations of the company would not be implied from a knowledge of such regulations, if they were unreasonable.

A review of these and other authorities shows, we think, that the regulation of the defendant company requiring a prepayment of a quarter's rent for a water supply for domestic purposes is reasonable. We are not dealing with a case where the residence of the consumer is metered, and the exact quantity used by him can be measured. In such case the party pays for the water actually consumed by him, at the scale of prices fixed by the company, assuming its charges to be reasonable. In the case at bar the complainant gets his water from a hydrant in his yard, connected with the service pipe of the company, and the rule of the company fixes the quarter rent. Paying this rent, he is limited to the consumption of no definite quantity of water. The only limitation upon his use of it, so far as we gather from the record, is an implied one, that he must not waste it; and, if he does waste it, the company, under the authorities cited, can cut off the supply. But, in a controversy over this, the courts, we take it, are the tribunals to ultimately settle it, and not the company. The rule or requirement of the company that the party taking and paying for water for domestic purposes only must put his hydrant appliances in condition for such use only, and not have it in a condition to use water through and from them for sprinkling purposes, unless he pays a reasonable rental for the use for the latter purpose, is, we think, reasonable, and one that the company can enforce. Such a regulation for the sale of its water furnished through hydrants, where the quantity used cannot be or is not measured, is essential to protect the rights and safety of the company, and may be necessary to enable it to meet its obligations to the public, and its duty to furnish water to all inhabitants of the city alike and without discrimination. In determining the reasonableness or unreasonableness of a rule adopted by a water company chartered to supply a city and its people with water, we must necessarily take into consideration its relation to the city, and its compacted population, and the various elements composing such a population. It has no right to base a rule on the theory that the population, as a whole, is dishonest. But it has the right to adopt a rule which, while giving the honest citizen what he pays for, will prevent the dishonest from getting what he never paid for, and never intended to pay for, and said he never wanted. It may be doubted whether the company has the right to make an arbitrary rule requiring the citizen to pay for water taken through his hydrant for sprinkling purposes for seven months in the year, when he does

not want it and does not need it for that purpose for that length of time. As we understand the relation of the complainant to the company in respect to this point, under the facts averred in his bill, this question is not necessarily in the case. If, when he wants water for sprinkling purposes, he will put his water appliances in condition for its use for this purpose, and apply to the company for water for this purpose for a less period of time than for the whole sprinkling season fixed by the company, tendering it a reasonable price for the water thus demanded, he will raise and present the question of the reasonableness or unreasonableness of the rule of the company on this matter assailed by the bill. As we have held, it was the duty of complainant to put his hydrant and its appliances in a condition to get water alone for domestic purposes, when he wanted it only for that purpose. Failing to put them in condition to use water alone for domestic purposes while he wanted water for this purpose alone, he had no right to demand that the company furnish him water for domestic purposes and agree to furnish him water for sprinkling purposes at some indefinite time in the future, and for an indefinite period thereafter, as he might call for it or need it. Such a demand, it seems to us, ignores the reciprocal relations and duties existing between city water companies and the inhabitants of the cities they are organized to supply with water. There is no error in the decree of the chancellor, and it is affirmed, with costs.

The other judges concur.

BROWN *v.* WESTERN UNION TELEGRAPH CO.

SUPREME COURT OF THE TERRITORY OF UTAH, 1889.

[6 *Utah*, 219.]

JUDD, J. This is an action brought by the plaintiff against the defendant in the District Court at Ogden City. The facts of the case show that on the 8th of April, 1888, between 5 and 6 o'clock in the evening, the plaintiff, a girl about five years old, had her hand badly mashed, and to such an extent that her forefinger of the right hand was broken at the middle joint. It seems that she, together with other children, were engaged playing upon the turn-table of the railroad at a station called Promontory, in Box Elder County, Utah Territory, about 50 miles north of Ogden City. That when her father discovered her injury, — there being no physician that could be reached nearer than Ogden City, — he at once telegraphed to that city for a physician. To this telegram he received an answer that the physician could not come. Immediately upon the receipt of the telegram from the physician he sent the following: "Promontory, April 8th, 1888. To J. R. Brown, Ogden, Utah. — Send doctor on first train. Katy has broken her finger. T. G.

Brown." This telegram was received by the agent of the defendant at Promontory, who was likewise the agent of the railroad, at 6.30 o'clock, Promontory time, — 7.50 Ogden time. Trains left Ogden, going west, one at 7 P. M., and one at 11.30 at night. This despatch was not delivered by the company to Brown until 7.35 A. M. the next day. The testimony sufficiently shows that if the despatch had been delivered to Brown at Ogden, that he would have procured a physician to go to Promontory, who would have left on the 11.30 train, and arrived at Promontory at 2 o'clock. As it was no physician reached the plaintiff that night, and the next morning her father took her upon the train, and arrived at Ogden at 10 o'clock on the morning of the 9th. When the father arrived at Ogden he at once took her to the office of a physician and surgeon by the name of Bryant, who found, as he states, that the fore part of the finger, from where it was broken, was, to use his own language, "dead;" that by twisting the finger around, or by some other means not entirely described, the circulation had been strangled; and that he found it in such a condition that it was impossible to re-establish circulation, and that amputation was necessary, and he amputated it at the middle joint. The action of the plaintiff against the defendant is founded upon the idea that if the despatch sent to Brown had been delivered in proper time a physician would have arrived at Promontory at the hour of 2 o'clock that night after the accident, and that the finger, by proper surgical treatment, could have been saved, and the plaintiff saved of much pain and suffering. This theory of the case is put in issue by the defence and the ground taken is, *first*, that the proof does not show that the final amputation of the finger was the result of any delay in procuring a physician, and that it was probably the result of the accident which so badly damaged the finger; and that in any event amputation would have been necessary, and that the delay and negligence, if any, of the defendant, was not the proximate cause of the loss of the finger, and the pain and suffering; and therefore the defendant alleges that it is not liable; and for further defence it sets up that the manager of the defendant company in charge of the office in Ogden had established certain rules with reference to the delivery of despatches from that office, and that those rules were reasonable, and that, all other questions aside, it is not liable. It alleges and shows by the proof that, the day of the reception of this despatch at Promontory and its transmission to Ogden City being Sunday, its office hours were from 8 to 10 o'clock A. M. and 4 to 6 P. M., and that on week-days from 7.30 A. M. to 8 P. M. That this despatch, being received at Ogden at 8 o'clock and 9 minutes, was more than two hours after the office hours established for this office, and, to use the language of the brief of the counsel for the defendant, "these hours being reasonable, the company was not bound to deliver the despatch received outside of the hours, no matter what the consequences may have been."

So far as the first point of the defence is concerned, — that is, "that

the proof does not sufficiently show that the result to the plaintiff would have been different had the despatch been delivered," — this court is content to observe that all those matters were submitted fairly, and under proper instructions by the trial judge to the jury, and, the jury having found against the defendant, the rule of this court is that it will not disturb the verdict of a jury where the evidence tends to support it, and under that rule this case falls. But the more important question arises on the ground as to the right of the defendant to establish rules for its guidance in the delivery of telegrams. It will be remembered that this telegram was received at Promontory, and the money paid for its transmission to the Ogden office, and that it was transmitted in due time to the last-named office; and the only complaint, when the case is stripped of verbiage, is that the defendant company were guilty of negligence in failing to deliver this telegram when it reached Ogden City from that office to Brown, the person to whom it was sent; and the direct defence of the defendant is that it was received after its office hours, which it had the right to establish, and that therefore there was no negligence. In other words, the defendant says "that we have the right to establish hours for the transmission and delivery of despatches, and we have the right to judge of the reasonableness of those hours, and that, so long as we are within the observance of the rules and hours which we have established, we are guilty of no negligence;" the argument being that the public is bound to take notice of the hours and rules that "we have established for business." Can this contention be sanctioned, is the important question which arises in this case. Whether, if a telegram were tendered the company to be sent by them out of their office hours, they would be bound to receive and send it, is a question with which the court is not now dealing, and upon which it expresses no opinion; but we are of the opinion that, having received and transmitted this despatch, the measure of diligence to be applied to the conduct of the defendant, with reference to its delivery, is not to be, and cannot be, decided by any rules or hours that the company may see fit to establish. Whether in the individual case the rules of the company are or are not reasonable, or whether it is or is not guilty of negligence in failing to deliver a message, is a question which the court will not allow the company to decide. It is a fundamental rule in the administration of remedial justice that courts claim and exercise for themselves the right to adjudge in each individual case as it may be presented the question of whether the parties sued are or are not guilty of wrong, with reference to the particular transactions under investigation. Whether the rules established by the defendant are reasonable or not, as we have said, is a question to be decided by the court or jury, as the case may be, in each individual case as it arises. It will not do to say that, because the company has the right to establish rules for its government, therefore those rules determine the question of negligence or no negligence. It must be remembered that this defendant, in offering its services to the public,

and receiving the money of people for sending despatches from one point to another, is, to say the least of it, occupying the position of a public institution. In the language of Chief Justice Waite, in the case of Munn *v.* Illinois, 94 U. S. 113: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use." This defendant company, by its invitation to the public to use its lines for the transmission of messages, impliedly grants to the public an interest in the use of its wires, and, having done this, like all other institutions of like character, its rules and regulations are at all times open to inquiry as to their reasonableness, and its conduct is at all times open to inquiry, as to whether it is guilty of negligence or not. We are of the opinion that the question in this case of the reasonableness of these rules of the company was properly submitted to the jury; and we are also of the opinion that the question of whether this company was guilty of negligence in failing to deliver the despatch was properly submitted to the jury; and in both instances the jury found against the defendant.

In order that there may be no misunderstanding as to the judgment of the court in the case, we lay down the following rule as applicable to the facts in the case: It will be observed that this despatch was in plain, unambiguous language. It said: "Send doctor on first train. Katy has broken her finger." When that despatch was received at Promontory for transmission, and when it was received at Ogden by the agents of the defendant, the supreme importance of prompt and active service upon the part of the defendant's agents in delivering that telegram was made manifest from its very reading, and we hold that the degree of diligence required of the defendant was equal in importance to the emergency of the occasion, and this without any regard to rules and hours established by the company, as testified to in this regard. It must be kept in mind that this company at Promontory, by its agent, received this despatch, and received the money for its transmission, and that it was transmitted to the office at Ogden; that this despatch was to the effect that a child was suffering with a broken finger; that it was important that a physician and surgeon be immediately sent; and to allow the defendant, upon the pretext that it was received out of its office hours, to let it lie there until 7.35 the next morning, and then to excuse it from delivery under such circumstances would be the greatest injustice. It would be to put the public at the mercy entirely, or we may say the caprice and will, of public institutions, to which they are compelled to resort in the transaction of business. So far as the receipt and delivery of telegrams with reference to commercial transactions are concerned, we do not express an opinion, but we do not hesitate to say that when a despatch shown to be received by the company for transmission, which upon its face demonstrates the importance of delivery, as in this case, the degree of

diligence is to be in proportion to the exigencies of that case. Nor has the defendant the right to complain at this. It sets itself up as a transmitter of messages for the public, and it receives franchises from the State, in order that it may do business; it receives money from the public for the transmission of messages, and, like all other institutions, it should be willing to deal with the public in a fair and just manner, and not undertake to screen itself behind mere office rules and hours, which in all probability are made for the mere convenience of the employees; and especially in cases like this, where human pain, suffering, and deformation hang upon prompt action. Nor are these views new, but find ample authority in adjudged cases of high respectability. As a sample we cite the cases of Telegraph Co. *v.* Broesche, 10 S. W. Rep. 734, and Telegraph Co. *v.* Sheffield, 10 S. W. Rep. 752. Other cases could be cited, but the foregoing are sufficient. The case was fairly submitted by the court to the jury, under instructions in some respects more favorable to the defendant than the law warranted, and we are satisfied that substantial justice has been reached, and the judgment of the court below will be affirmed, with the costs.

WESTERN UNION TELEGRAPH CO. *v.* NEEL.

SUPREME COURT OF TEXAS, 1894.

[86 *Tex.* 368.]

GAINES, J. "Upon the trial of the above entitled cause in the court below, it was shown, that Jodie Roden, a sister of the appellee Ella Neel, was lying at the point of death at her home near Hope, in Lavaca County; that a brother of appellee went to the town of Yoakum, where appellant had an office, about 4 o'clock in the morning of July 29, 1891, and caused a telegram to be sent to Cuero to be addressed to Mrs. Neel, care of the Dromgoole Hotel, asking her to come to her sister at once. The telegram was received at Cuero about 4.50 o'clock, but was not delivered until about 10 o'clock on the same morning. Mrs. Neel set out at once to go to her sister, but Mrs. Roden had died when Mrs. Neel arrived. If the telegram had been delivered promptly when it was received at Cuero, Mrs. Neel could have reached her sister before she died.

"In defence of this suit for failure to deliver said telegram promptly, the appellant pleaded and proved, that its office hours at Cuero were from 7 o'clock A. M. to 7 o'clock P. M., and that the messenger did not reach the office until 7 o'clock A. M.; and there was evidence that after this hour the telegram was promptly delivered; and it alleged that the fixing of office hours was a reasonable regulation, that it was permitted by law to make.

"The court charged the jury, in effect, that such regulation was proper, but that the sender of the telegram must either know or be reasonably presumed to know of it, or be informed thereof by defendant's agent.

"The defendant then requested the following instruction to the jury: 'All messages to be sent by telegraphic wire are accepted subject to the delays ordinarily incurred during transmission; and if the jury believe from the evidence that the defendant company had reasonable office hours, during which it delivered telegraphic messages in the town of Cuero, it was not by law compelled to deliver messages outside of said hours; and such reasonable business hours were implied in the contract between the plaintiff and defendant company, if such contract has been proved, unless specially stated or understood by the parties to said contract that the services to be performed should be performed otherwise than in the usual manner and subject to the usual rules under which the company does business.'

"The instruction asked by the defendant was pertinent, because if the message had been delivered within a reasonable time after 7 o'clock, the plaintiff would probably not have had time to see her sister before she died."

Upon the foregoing statement, which we have quoted from the certificate of the Court of Civil Appeals, they submit to us the following questions:

"Believing that it has never been authoritatively settled by our Supreme Court, that it is the duty in such case of the telegraph company to give notice to the sender of a despatch of the office hours at the receiving office, provided they are established and reasonable, and that the message will not be delivered outside of such office hours, we certify for the decision of the Supreme Court, which arises on appeal to this court, whether or not, in the absence of proof of a special contract to send and deliver at once, and the absence of actual notice to the sender of the regulation and office hours, the undertaking of the company was to deliver the message at once.

"Should the instruction have been given?"

We are of the opinion, that under the circumstances stated in the question, it was not the duty of the company to deliver before its office hours, and that the requested charge should have been given. A telegraph company, from the necessity of the case, must have power to make some regulations for the conduct of its business; and when such regulations are reasonable, it is generally conceded that a party who contracts with such a company for the transmission of a message is bound by them, provided he has notice of their existence. But whether or not he is bound when he has no notice, is a question which is by no means settled. We concur with the Court of Civil Appeals in holding that the question has never been authoritatively determined in this court.

Under the peculiar circumstances of the case, it was held in Western Union Telegraph Company *v.* Broesche, 72 Tex. 654, that the fact

that the company's office at the delivering station was closed at the time the despatch was transmitted, did not exonerate it from liability. But the agent of the company who accepted the message for transmission testified, that he knew that the purpose was to notify the person addressed of the expected arrival of the dead body of the plaintiff's wife at the railway station, and that unless it was delivered on the same evening the corpse would reach the station before the telegram. Having received the plaintiff's money, knowing his object in sending the message, and that that object could only be attained by prompt transmission and delivery to the person addressed, it could not legally urge its rules as to office hours as an excuse for not delivering the despatch until the next day. It was properly held estopped to deny that the contract was for an immediate delivery.

In the Bruner case, 19 Southwestern Reporter, 149, it would seem that the defence was set up, that at the time the despatch was taken for transmission the office to which it was to be sent was closed; but we think it is apparent from the opinion that the point before us was not involved. The court in their opinion say: "Appellant accepted the telegram and undertook to deliver it about 9 o'clock at night. It cannot be excused in its failure to perform the contract because its office was practically closed against Alvin, especially since it does not appear that any effort was made to send the message until next morning, when it was too late for the appellee to catch the train to Galveston."

Upon the more general question, whether a party to a contract with a telegraph company is bound by the rules and regulations of the company of which he has no notice, the authorities are not in accord.

In Birney *v.* Telegraph Company, 18 Md. 341, the court say, that a person delivering a message for transmission "is supposed to know that the engagements of the company are controlled by those rules and regulations, and does himself in law engraft them in his contract of bailment, and is bound by them." The doctrine is reaffirmed in Telegraph Company *v.* Gildersleeve, 29 Md. 232; but is questioned by Judge Thompson in his work on the Law of Electricity (section 212). The law of Maryland expressly provides that telegraph companies may make rules and regulations, and the opinions in the cases cited lay stress upon that fact; but it seems to us, that in the absence of a statute the power is necessarily implied.

In Given *v.* Telegraph Company, 24 Fed. Rep. 119, it was held, in effect, that a telegraph company could establish reasonable office hours, and that the sender of a message was presumed to contract with reference to such a regulation, although it was not known to him at the time that he entered into the contract.

In Telegraph Company *v.* Harding, 103 Ind. 505, the same rule was applied in an action for the recovery of a penalty given by statute for the failure to make prompt delivery of a message; but the court expressly decline to say that it ought to apply to an ordinary suit for the

recovery of damages for the breach of a contract to transmit a telegram. The court quote from the opinion of Mr. Justice Miller in Given's case, *supra*, as follows: "Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when any other office closes for the night. The immense number of these offices over the United States, the frequent changes among them as to the time of closing, and the prodigious volume of a written book on this subject, seems to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for the neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same State than those four thousand miles away, for the communication is between them all and of equal importance."

In Behm *v.* Telegraph Company, 8 Bissell, 131, Judge Gresham, in charging the jury, recognized the doctrine, that reasonable regulations as to the number of servants at small stations should be considered in determining the question of diligence in the delivery of a message, and that the absence of a messenger boy at dinner might be a just excuse for delay in such delivery. But see Tel. Co. *v.* Henderson, 89 Ala. 510.

Such are the cases bearing immediately upon the question submitted for our determination. There are, however, some railroad cases which seem to involve a similar principle. The contract of a railroad company with a passenger is to carry him to his point of destination under the contract without unreasonable delay. Yet it is held, that a passenger who procures a ticket has no right to demand an immediate carriage, and must wait till the departure of the regular trains. Hurst *v.* Railway, 19 C. B. N. S. 310; Gordon *v.* Railway, 52 N. H. 596. There are delays which grow out of the necessary regulation of the business, for which the carrier cannot be held responsible. If a passenger, on the other hand, be misled by the company's time table, and buy his ticket upon the faith of it, the company may be held liable for not carrying him according to the table. In an English case of this character the action was sustained on the ground of deceit. Denton *v.* Railway, 5 El. & Bl. 860.

A limit as to the number of its trains and intervals of time more or less extended are obviously indispensable to the conduct of the business of a railway company. So also with telegraph companies. Although not absolutely necessary, some regulations as to office hours and as to the number of employees at each office are reasonably required for the successful management of their business, both in their own interest and in that of the public in general. It may be to the interest of some individual, upon a particular occasion, or even at all times, that every office of a telegraph company should be kept open at all hours, and that the working force should be sufficient to receive and deliver a despatch without a moment's delay. So also, it may be to the interest of a very few that an office should be kept at some point

on the line where an office could not be maintained in any way without a loss to the company. If in the first instance the company should be required to keep the necessary servants to keep its business going at all hours, it would result in the necessity of closing many offices or in the imposition of additional charges upon its customers in general, in order to recoup the loss incident to their being maintained. So on the other hand, if they should be required to keep offices wherever it might result to the convenience of a few persons, additional burdens upon the general public would in like manner result.

It follows, we think, that the public interest demands that these companies should have the power to establish reasonable hours within which their business is to be transacted, and that individual interests must yield. It seems to us, that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message who desires its delivery at an unusually early hour for business, the propriety of making inquiry before he enters into the contract.

In the application of the principles of law to new cases, we should proceed with caution, and therefore we deem it proper to say that our ruling is restricted to the question submitted. Whether the rule we have announced should be applied to other regulations by telegraph companies, we leave for decision when the question may arise.

This opinion will be certified in answer to the questions submitted.

SEARS *v.* EASTERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[14 *Allen*, 433.]

ACTION containing one count in contract and one in tort. Each count alleged that the defendants were common carriers of passengers between Boston and Lynn, and that on the 15th of September, 1865, the plaintiff was a resident of Nahant, near Lynn, and the defendants before then publicly undertook and contracted with the public to run a train for the carriage of passengers from Boston to Lynn at nine and one half o'clock in the evening each week day, Wednesdays and Saturdays excepted; and the plaintiff, relying on said contract and undertaking, purchased of the defendants a ticket entitling him to carriage upon their cars between Boston and Lynn, and paid therefor twenty-five cents or thereabouts, and on a certain week day thereafter, neither Wednesday nor Saturday, namely, on the 15th of said September, presented himself on or before the hour of nine and a half o'clock in the evening at the defendants' station in Boston and offered and attempted to take the train undertaken to be run at that hour, as a passenger, but the defendants negligently and wilfully omitted to run the said train at

that hour, or any train for Lynn, till several hours thereafter; wherefore the plaintiff was compelled to hire a livery carriage and to ride therein to Lynn by night, and was much disturbed and inconvenienced.

The following facts were agreed in the Superior Court. The defendants were common carriers, as alleged, and inserted in the Boston Daily Advertiser, Post, and Courier, from the 15th day of August till the 15th day of September an advertisement announcing the hours at which trains would leave Boston for various places, and among others that a train would leave for Lynn, at 9.30 P. M., except Wednesdays, when it would leave at 11.15, and Saturdays, when it would leave at 10.30.

The plaintiff, a resident of Nahant, consulted one of the above papers, about the 9th of September, 1865, for the purpose of ascertaining the time when the latest night train would start from Boston for Lynn on the 15th, in order to take the train on that day, and saw the advertisement referred to. On the 15th, which was on Friday, he came to Boston from Lynn in a forenoon train, and in the evening, shortly after nine o'clock, presented himself at the defendants' station in Boston for the purpose of taking the 9.30 train for Lynn, having with him a ticket which previously to September 9th he had purchased in a package of five. This ticket specified no particular train, but purported to be good for one passage in the cars between Boston and Lynn during the year 1865. He learned that this train had been postponed to 11.15, on account of an exhibition, and thereupon hired a buggy and drove to Lynn, arriving there soon after 10.30. He had seen no notice of any postponement of this train. He once, in 1864, observed a notice of postponement, and heard that the defendants sometimes postponed their late trains.

For several years before 1865 the defendants' superintendent had been accustomed occasionally to postpone this train, as often as from once to three times a month, for the purpose of allowing the public to attend places of amusement and instruction, and also upon holidays and other public occasions in Boston; giving notice thereof by handbills posted in the defendants' cars and stations. On the 13th of September, 1865, in pursuance of this custom, he decided to postpone this train for September 15th till 11.15, and on the same day caused notice thereof to be printed and posted in the usual manner. The train was so postponed, and left Boston at 11.15, arriving at Lynn at 11.45.

The defendants offered to prove, if competent, that this usage of detaining the train was generally known to the people using the Eastern Railroad, and that the number of persons generally going by the postponed train was larger than generally went by the 9.30 train, and was larger on the evening in question; but at the station in Boston there were persons complaining of the postponement of the train, and leaving the station.

It was agreed that, if on these facts the plaintiff was entitled to recover, judgment should be entered in his favor for ten dollars, without costs. Judgment was rendered for the defendants, and the plaintiff appealed to this court.

J. L. Stackpole, for the plaintiff.

C. P. Judd, for the defendants. If the plaintiff can maintain any action, it must be upon the count in contract. There was no proof of deceit. Tryon *v.* Whitmarsh, 1 Met. 1. What then was the nature of the contract between the parties? The ticket merely secured one passage at any time in 1865. This was a contract to carry the plaintiff in the usual way of transporting passengers. It was usual to postpone this train, in order to give the public greater accommodations. The plaintiff was bound by this usage, whether he knew it or not. If he neglected to inquire as to the custom, it is his own fault. Van Santvoord *v.* St. John, 6 Hill, 160; Cheney *v.* Boston & Maine Railroad, 11 Met. 121; Clark *v.* Baker, Ib. 186; City Bank *v.* Cutter, 3 Pick. 414; Ouimit *v.* Henshaw, 35 Vt. 616, 622. If the advertisement was an offer to carry passengers at 9.30, this offer was withdrawn on the 13th by due notice. M'Culloch *v.* Eagle Ins. Co., 1 Pick. 278; Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. The acquiescence in the usage of the defendants by the public for years shows that the notice was sufficient. The plaintiff should have made further inquiry. Booth *v.* Barnum, 9 Conn. 290; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Taylor *v.* Baker, 5 Price, 306.

CHAPMAN, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties. Cheney *v.* Boston & Fall River Railroad, 11 Met. 121; Boston & Lowell Railroad *v.* Proctor, 1 Allen, 267; Najac *v.* Boston & Lowell Railroad, 7 Allen, 329. The principal question in this case is, what are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it. Denton *v.* Great Northern Railway, 5 El. & Bl. 860. It is an offer which, when once publicly made, becomes binding, if accepted before it is retracted. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised

to go from Boston to Lynn at 9.30 P. M., and the plaintiff presented himself, with his ticket, at the station to take the train, but was there informed that it was postponed to 11.15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given, but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown *v.* Eastern Railroad, 11 Cush. 101; Malone *v.* Boston & Worcester Railroad, 12 Gray, 388. The defendants published daily advertisements of their regular trains in the Boston Daily Advertiser, Post, and Courier, and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware *v.* Hayward Rubber Co., 3 Allen, 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.

CHICAGO, B. & Q. R. CO. *v.* GUSTIN.

SUPREME COURT OF NEBRASKA, 1892.

[35 *Neb.* 86.[1]]

MAXWELL, C. J. . . . The plaintiff below offered in evidence the following bill of lading:

"12–14–86–150 M. Form 71.

"CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RY. CO.

"EDGAR HILL, Gen'l Freight Agent, Cleveland, O.
"A. S. WHITE, Assist. Gen'l Freight Agent, Cleveland, O.

This bill of lading to be presented by consignee without alteration or erasure.	CLEVELAND, O., 9–8, 1888.
MARKS, CONSIGNEE, ETC.	Received from the Eberhard Manf. Co., in apparent good order, except as noted, the packages described below (contents and value unknown), marked and consigned as per ——
A. J. Gustin, Lincoln, Neb.	
This bill of lading contracts rates from —— to Wann, Ill., via ——, at 25c. per lot and charges advanced at $——.	

One box iron castings $1 25

(Printed across the end: "C., C., C. & I. Ry. Gen'l Freight F. A., Pivi Sch. 8, 1888. E. L. Campbell, per —— B. This stamps receipts for freight but not for rates. Rate, 292 pr. 100 lbs. Wann, Ill., to Lincoln, Neb. Guaranteed by Western road.")
which the C., C., C. & I. Ry. agrees to transport with as reasonable despatch as its general business will permit to destination, if on its road, or otherwise to the place on its road where the same is to be delivered to any connecting carrier, and there deliver to the consignee or to such connecting carrier upon the following *terms* and *conditions*, which are hereby agreed to by the shipper, and by him accepted as just and reasonable, and which are for the benefit of every one over whose line said goods are transported:

"1st. Neither this company, nor any other carrier receiving said property to carry on its route to destination, is bound to carry the same by any particular train, or in time for any particular market, and any carrier in forwarding said property from the point where it leaves its line is to be held as a forwarder only.

"2d. Neither this company nor any such other carrier shall be liable for any loss of or damage to said property by dangers or accident incident to railroad transportation, or by fires or floods while at

[1] This case is abridged.—ED.

depots, stations, yards, landings, warehouses, or in transit. And said property is to be carried at owner's risk of leakage, breakage, chafing, loss in weight, or loss or damage caused by changes in weather, or by heat, frost, wet, or decay, and if any portion of its route to destination is by water, of all damages incident to navigation.

"3d. Responsibility of any carrier shall cease as soon as said property is ready for delivery to next carrier or to consignee, and each carrier shall be liable only for loss or damage occurring on its own line, and in case of loss or damage to such property for which any carrier shall be responsible, its value or cost at time and place of shipment shall govern settlement therefor, unless a value has been agreed upon with shipper or is determined by the classification upon which the rate is based, in which case the value so fixed by agreement or classification shall govern; and any carrier liable on account of loss of or damage to such property shall have the benefit of any insurance effected thereon by or on account of the owner or consignee thereof.

"4th. Such property shall be subject to the necessary cooperage and bailing at owner's cost; and if the owner or consignee is to unload said property, the delivering carrier may make a reasonable charge per day for the detention of any car after the same has been held twenty-four hours for unloading, and may add such charge to the freight due and hold said property subject to a lien therefor."

. . . . . .

This bill was objected to, for the reason that there was no evidence of its authenticity and because the company could not bind the C., B. & Q. Railway Company. These objections were overruled and the bill received.

It will be observed that the answer of the railroad company admits receiving at Wann, Illinois, a box of saddlery hardware weighing 125 pounds, admits in effect all that is claimed in the petition, except that they do not wrongfully withhold the same, and it alleges that the hardware is a kind classified as No. 2 in the schedule. There was no error in admitting the bill of lading, therefore. In a case of this kind, where the employment is not denied, it is probable that the bill is *prima facie* admissible in evidence, and a denial of its genuineness must be made by the adverse party to require proof on the point, but it is unnecessary to determine that point. It appears from the testimony that goods are not infrequently labelled improperly. Thus, common hardware in boxes is placed in the fourth class, while saddlery hardware is classified as No. 2; that the companies have inspectors to open the packages and place the goods in the proper class; that in this instance the inspector opened the box, which was filled with Japanned iron rings, and, as Mr. Gustin had been engaged in the saddlery business, he at once seems to have assumed that the rings were designed for that business, and at once classified the goods as No. 2, the freight on which is eighteen cents per hundred. It is clearly shown that the rings are a new patent designed for a neck yoke for horses, and in no way

connected with saddlery hardware. Upon this point there is practically no dispute, so that the classification No. 4 is correct, and the rates as shown by the schedule are less than sixty-two cents per hundred, and as Mr. Gustin had offered to pay that sum, he was entitled to recover. There is no error in the record, and the judgment is

Affirmed.

The other judges concur.[1]

PHILLIPS *v.* SOUTHERN RAILWAY.

SUPREME COURT OF NORTH CAROLINA, 1899.

[124 *N. C.* 123.[2]]

FURCHES, J. On the 15th of December, 1896, the plaintiff, intending to take the next train on defendant's road to Hot Springs, in Madison County, entered the defendant's waiting-room at Asheville about eight o'clock at night, with the intention of remaining there until the departure of the next train on defendant's road for Hot Springs, which would leave at 1.20 o'clock of the next morning. He was informed by defendant's agent, in charge of the waiting-room, that according to the rules of the company, she must close the room and that he would have to get out. The plaintiff protested against this, and refused to leave.

But when the clerk of defendant's baggage department (Graham) came and told him that he could not stay, and made demonstrations as if he would put him out, he left; that he had no place to go where he could be comfortable; that the night was cold; that he was thinly clad and suffered very much from this exposure, and took violent cold therefrom, which ran into a spell of sickness from which his health has been permanently injured.

It was in evidence, and not disputed, that the rules of defendant company required the waiting-room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting-room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until thirty minutes before the departure of defendant's next train at 1.20 o'clock of the next morning. . . .

So the only question that remains is as to whether the defendant had the right to establish the rule for closing the waiting-room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule and that it was a reasonable one. Webster *v.* Fitchburg R. Co., 161 Mass. 298; 34 At. Rep.

[1] *Compare:* Savannah Co. *v.* Bundick, 94 Ga. 775; Smith *v.* Findley, 34 Kans. 316; Wellington *v.* R. R., 107 Mass. 582; Express Co. *v.* Koerner, 65 Minn. 540; Baldwin *v.* S. S. Co., 11 Hun, 496; New York Co. *v.* Gallaher, 79 Tex. 685. —ED.

[2] Part of the opinion is omitted. — ED.

157.; 1 Elliott on Railroads, sections 199 and 200; 4 Elliott on Railroads, section 1579.

The case would probably be different in the case of through passengers, and in the case of delayed trains; but if so, these would be exceptions and not the rule.

Waiting-rooms are not a part of the ordinary duties pertaining to the rights of passengers and common carriers. But they are established by carriers as ancillaries to the business of carriers and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error.

New trial.

OHAGE *v.* NORTHERN PACIFIC RAILWAY.

CIRCUIT COURT OF APPEALS, 1912.

[200 *Fed.* 128.[1]]

HOOK, Circuit Judge.

[1] A railroad company may lawfully make reasonable rules and regulations for the running of its trains and the carriage of its passengers. Whether a particular regulation is reasonable is a question of law, when the circumstances which bring it about are not in dispute.

[2] When adequate facilities for local passenger traffic between two localities is otherwise provided, a regulation of a railroad company that another train shall not engage therein is a reasonable one. These principles are well established. Kyle *v.* Railway, 105 C. C. A. 151, 182 Fed. 613; Atchison, etc. R. Co. *v.* Cameron, 14 C. C. A. 358, 66 Fed. 709; Texas & P. R. Co. *v.* Ludlam, 6 C. C. A. 454, 57 Fed. 481. The importance and propriety of such regulations in the conduct of the railroad business is recognized in the cases in which it is held that, when a railroad company has provided adequate service for localities within a state, a state law requiring it to add to such service a through or limited train engaged in interstate commerce, may be void. The

[1] An extract only is printed. — ED.

law is held invalid when it operates as a burden on or to the detriment of such commerce. Herndon v. Railway, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Atlantic Coast Line v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Mississippi Railroad Commission v. Railroad, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209.

[3] A regulation may permit the discharge of passengers from a train at a locality, and yet there may be good reasons growing out of the character of the patronage, as is the case here, why others should not be taken on; and, to avoid discrimination, a regulation should be general within the scope of its operation, and not depend upon the accident of the particular occasion.

[4] Folders are voluntarily issued by railroad companies for the information of the public, and not by reason of any statutory requirement or public duty. It would be impracticable to recall and destroy an entire issue when changes are made in train service, and from abundance of caution it is customary, though perhaps not the invariable practice, for them to insert a statement in their folders that the right is reserved to vary therefrom without notice. Such a statement appeared in the folder the plaintiff consulted. Railroad companies are not held to adhere to the schedules appearing in their folders merely because they remain extant and in circulation. They must and do frequently change the service of their trains to adjust their business to conditions as they arise, and it is common knowledge that information thereof can be obtained of ticket agents and in large cities at information bureaus established for the purpose. The plaintiff himself, though he had procured a folder, inquired of the information bureau in St. Paul when a train left after 2.15 in the afternoon for White Bear; but he made no inquiry when he could return, or whether he could return on the Limited.

[5] It is contended that the reply of the agent at White Bear that the Limited was on time, in response to his question, was a "direct intimation" of his right to ride on it. We think the incident had no necessary pertinence to the right asserted. Such questions are asked from a variety of motives, and it was not for the agent to ask him in return why he wanted to know. There was no apparent implication that the plaintiff expected to take the train for St. Paul.

[6] But, were it otherwise, the plaintiff's situation was not caused or changed by what the agent said, even if it be assumed he could bind the company under the circumstances. There was no error in the rulings of the court upon the evidence pointed out in the assignments.

The judgment is affirmed.

VIRGINIA RAILWAY & POWER CO. *v.* O'FLAHERTY.

SUPREME COURT OF APPEALS OF VIRGINIA, 1916.

[118 *Va.* 749.[1]]

WHITTLE, J., delivered the opinion of the court.

THE court correctly held, "that the rule of the defendant requiring a passenger to deposit his fare (or ticket) in the box is a reasonable regulation, and one with which the passenger should comply. The burden imposed upon the passenger of stepping back to the platform and personally putting his fare in the box, when he has taken his seat without doing so, is very slight, and taken in connection with the purposes of a pay-as-you-enter car, and with the necessity of rendering street car traffic in crowded cities as efficient as practicable for the general public, is not an unreasonable requirement. . . . The rule in question here was a public regulation of the company of which the plaintiff had knowledge. By the refusal of the plaintiff to pay his fare in the manner required by this regulation, he placed himself in default. Upon his refusal so to pay, or to leave the car, the company by its agents, the conductor and the motorman, acquired the right to eject him from the car."

The authorities fully sustain the above statement of the law.

"It is well-settled law that a carrier has a right to make reasonable rules and regulations for the conduct of its affairs, and that they are binding upon the passengers and the public dealing with the carrier when brought to their notice. . . . The reasonableness of the rules and regulations of a railroad company is a question of law addressed to the court." N. & W. Ry. Co. *v.* Wysor, 82 Va. 250, at pages 260–1; Va. & S. W. Ry. *v.* Hill, 105 Va. 738, 54 S. E. 872, 6 L. R. A. (N. S.) 899; N. & W. Ry. Co. *v.* Brame, 109 Va. 422, 430, 63 S. E. 1018.

"It is within the power of the company to make and enforce a reasonable rule as to the time, place and manner of payment of fares." Knoxville Traction Co. *v.* Wilkerson, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579, 10 Ann. Cas. 641, Nellis on Street Railways (2d Ed.), § 264.

There are numerous cases which uphold the reasonableness of rules similar to the one under consideration and the duty of the passenger to comply with them, and, upon refusal, the power of the conductor to eject him. Martin *v.* Rhode Island Co., 32 R. I. 162, 78 Atl. 548, 32 L. R. A. (N. S.) 695, Ann. Cas., 1912, C, p. 1283; Nye *v.* Maryville, &c. Co., 97 Cal. 461, 32 Pac. 530; Kitchen *v.* Saginaw (C. C.), cited in 117 Mich. 254, 75 N. W. 466, 41 L. R. A. 817.

[1] An extract only is printed. — ED.

CHAPTER VII.

DETERMINATION OF REASONABLE RATES.

FUNDERBURG v. AUGUSTA & AIKEN RAILWAY COMPANY.

SUPREME COURT OF SOUTH CAROLINA, 1908.

[61 *S. E.* 1075.[1]]

THE circuit court has found in this case that "a tender of $5 to pay a 5 cent fare would be disproportionate to the amount of the fare, and that, under a proper rule on the part of the carrier upon the subject, in existence and actually enforced, the carrier could not be forced to furnish change for so large an amount." He, however, held that such rule had not been brought to the notice of the travelling public, and had been habitually disregarded and waived. This shows that the circuit court would have regarded as unreasonable the tender to the defendant railroad of $5 for a 5 cent fare, had it been admitted that defendant had promulgated a rule to that effect, and had not waived it. There is therefore no finding below that the rule is unreasonable, and indeed there is no fact appearing in the record to suggest a doubt of its reasonableness. The difficulty of making change in the cotton picking season in South Carolina is a well-known fact, and the court takes notice of the territory and the thick population and the numerous mill towns along the route between Augusta and Aiken, which renders it probable that numerous fares will be collected on the defendant electric railway between these points on a single trip. To require defendant to furnish change for every bill presented would be unreasonable.

The California and New York courts agree upon the proposition "that a passenger upon a street railway is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender, and furnish change to a reasonable amount," but in California the court, in view of local conditions, held that a tender of a gold coin of $5, the lowest gold coin in use in that section, for a 5 cent fare was reasonable (Barrett *v.* Market St. Ry. Co., 81 Cal. 295, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. Rep. 62), whereas in New York it is held that conductors cannot be required to furnish change for a $5 bill in payment of street car fare, and that a rule of the company requiring change to be made to the amount of $2 is reasonable (Barker *v.* R. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St.

[1] An extract from the majority opinion is printed. — ED.

Rep. 626). Conceding that the conductor had more than $5 in change at the time plaintiff tendered his bill, that did not make it the conductor's duty to so deprive himself of change as to be unable to meet the reasonable requirements of the trip. Suppose he had $6.80 in change at the time. If he had given plaintiff $4.95 of that sum he would thereby have rendered himself unable to give change to the next passenger presenting a $2 bill. If he had failed to make change for such next passenger in breach of the rules of the company, would he not have violated the right of such passenger? Could not such passenger say: "You must change my $2 bill, because your rules require it." Can it possibly be a wilful breach of duty to the first passenger to decline to do that which would reasonably result in a breach of duty to the second passenger? It is true that a conductor on a number of occasions made change for $5, but this was when he had "plenty of change," and this was not in disregard of the rules, but in strict conformity thereto. "Plenty of change" does not mean plenty for a single transaction, but plenty for the reasonable requirements of the trip. The conductor must necessarily be allowed some discretion in deciding whether he has such an amount in change for the probable demands of the trip as would allow him to change over $2 in a particular case. We fail to find a scintilla of evidence in the record tending to show that the rule of the company had been habitually disregarded and waived. Indeed not one of the witnesses who testified as to seeing the conductor change a $5 bill previously to the occasion in question say that it was done after the 4th of November 1907, when the rule was adopted. The rule had been recently adopted before the occasion in question, and possibly it was negligence to fail to give some public notice of it. But, as declared in the New York case above cited, it is not the duty of the carrier to bring home to each passenger a personal knowledge of the existence of a reasonable rule. When notice of the rule was brought home to the plaintiff it was his duty to make an effort to comply, and yet it appears by his own testimony that he knew some of the people on the car, but did not try to borrow a nickel, and there is not a particle of evidence that he made the slightest effort to have his bill changed by his fellow passengers.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

BARRETT *v.* MARKET STREET RAILWAY.

SUPREME COURT OF CALIFORNIA, 1889.

[81 *Cal.* 296.[1]]

ACTION for damages for forcible ejection. Plaintiff tendered conductor of the defendant a five dollar gold piece for a five cent fare. The conductor refused it and thereupon ejected the plaintiff from the car.

PATERSON, J. . . . The question on the merits to which counsel have mainly directed their arguments is, whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time. Civ. Code, sec. 2187. And so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Civ. Code, sec. 2169. This duty, like every other which the law imposes, must have a reasonable performance. And we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that, on entering a street-car, a person should tender the sum of ten cents. Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was six and a quarter cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The act of 1878 forbids him to "charge or collect a higher rate than five cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at four and a quarter cents. And in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

[1] The case is abridged. — ED.

But it does not follow that the passenger may tender any sum, however large. If he should tender a hundred-dollar bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business. *Judgment for plaintiff.*[1]

WILLIAMS *v.* MUTUAL GAS CO.

SUPREME COURT OF MICHIGAN, 1884.

[52 *Mich.* 499.]

ERROR to the Superior Court of Detroit. (CHIPMAN, J.) Jan. 22 — Jan. 29.

Case. Plaintiff brings error. Affirmed.

SHERWOOD, J. The plaintiff, in the month of November, 1879, resided in Detroit and was in possession of and keeping the hotel known as the Biddle House, containing a very large number of rooms, all of which were furnished with gas-pipes and fixtures for the purpose of lighting the same, and which had been so lighted for many years.

The defendant corporation was duly organized under the Act of the Legislature for the formation of gaslight companies, approved February 12, 1855, and located in Detroit. On the 15th day of November aforesaid the defendant, in pursuance of said Act of the Legislature and the charter and by-laws of Detroit, was and had been for some time previous carrying on the business for which it was organized, supplying the citizens at hotels and private dwellings with gas in such quantities as desired, and among others had connected its pipes with those of the Biddle House, and for some time previous had been supplying it with gas as its proprietors desired. On that day the defendant refused to supply the Biddle House longer unless its proprietor, the plaintiff, would keep on deposit with the company $100. It was receiving at that time about $60 worth of gas per week, and its requirements were increasing.

The plaintiff regarding the demand as unreasonable, declined to make the required deposit, and tendered the defendant $75 and demanded that the company should furnish him gas at the Biddle House to that amount. This the defendant refused to do and cut off the service at the hotel.

The plaintiff claims that it was the defendant's duty to furnish him with the gas required, and upon the terms demanded; that he has suf-

[1] *Compare:* Fulton *v.* Grand Trunk Co., 17 U. C., Q. B. 428. — ED.

fered great injury to his business in consequence of the defendant's neglect so to do. And he brings his suit in this case to recover his damages. A trial was had in the Superior Court of Detroit, and the judge directed a verdict for the defendant. The plaintiff brings error and the case is now before us on a bill of exceptions containing all the testimony.

The questions presented and argued before the judge of the Superior Court by counsel for defendant were — First, the plaintiff could not recover for the reason the defendant was under no legal duty or obligation to supply any citizen of Detroit with gas; and, second, if such duty was imposed upon the defendant, the conditions upon which the defendant proposed and offered to perform it were reasonable. The court disagreed with the defendant's counsel in the first position, but sustained them in the second. I agree with the judge of the Superior Court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residences and places of business east of the centre of Woodward Avenue, with gas wherever the defendant has connected its mains and service pipes with the pipes and fixtures used at such residences and places of business and the owners or occupants shall desire the same.

The defendant is a corporation in the enjoyment of certain rights and privileges, under the statutes of the State and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted that corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot therefore be well likened to that of the innkeeper or common carrier, but more nearly approximates that of the telegraph, telephone, or mill-owner. The company, however, in the discharge of its duty may govern its action by reasonable rules and regulations, and when it has done so all persons dealing with it, as well as the company itself, must yield obedience thereto. The statute under which the defendant company is organized provides it may ordain and enact by-laws for that purpose; but the record discloses no such action taken on the part of the defendant; neither does it show any general action or custom of the company in making terms with, or for supplying gas to, proprietors of hotels or other persons except as required in this case.

The president of the defendant company was sworn and examined, and testified that the defendant made weekly or monthly collections for gas furnished. He further said that the defendant refused to let the plaintiff have a supply for the Biddle House unless he would first sign a contract with the company therefor, and in addition thereto keep on deposit with the company the sum of one hundred dollars so long as it furnished him with a supply; that the plaintiff tendered the defendant $75, and demanded that the company should supply the

house and offered to give good personal security for payment and performance on his part to the extent it should be furnished or the company require; and that the company refuse to accept the terms proposed by plaintiff, or furnish his house with gas as required.

This corporation is authorized and permitted to do business in Detroit only upon the ground of public convenience, and that benefits may accrue to its citizens.

It is true that neither by the charter of the company, its articles of association, or the by-laws of the city authorizing its existence there, has it the exclusive right to manufacture and sell gas. It is, however, within the experience of us all, and I may say, I think, with great propriety, within the judicial knowledge of the courts, that the manufacture and supply of inflamable gas for the purpose of lighting cities, villages, stores, hotels, and dwellings, is not a domestic or family manufacture. It is carried on almost exelusively by public or associated capital, and to make it a paying industry requires the exercise and enjoyment of certain rights and franchises only to be acquired from municipal or State authority. Associations of this kind, as has been well said, "are not like trading and manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world." It is not a trading corporation, its product is designed for the citizen, and the extent to which it is used depends upon home consumption in the immediate neighborhood and community in which the manufacture is wrought. It is in the strictest sense a local commodity, and not commercial. It can only be used by consuming it, and hence can have no place with articles of trade. The success of the company greatly depends upon the necessity of the citizens in the vicinity of its location, and its operations may seriously affect the public policy and individual convenience of the community. The nature of the article made, the objects of the company, its relations to the community, and the rights and privileges it must necessarily exercise, give the company a public character, and, to a certain extent, a monopoly which can never be tolerated, only upon the ground of some corresponding duty to meet the public want. Such duty rests upon this defendant, and I think it requires the company to furnish to this plaintiff, at the Biddle House, the supply of gas demanded, under reasonable rules and regulations, but among all such as might be mentioned, it is with the defendant to adopt and rely upon such as it may select. This is its privilege.

The duty of the company towards the citizen, and that of the citizen towards the company, is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the courts.

When the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it im-

posed upon itself the duty to supply the house and premises upon reasonable terms and conditions with such amount of gas as the owner or proprietor might require for its use, and pay for, so long as the company should exist and do business.

If the defendant, as one of such conditions, required the plaintiff to give sufficient security that he would make such payment and perform such conditions, before making such service, I thing it would have been reasonable, but in the place of such security the defendant demanded a deposit of money with the company, as had been its custom. This the company had a right to do. The condition was a reasonable one. The requirement of a special contract between the parties, in addition to the deposit of money, may not be unreasonable, still it was quite unnecessary. The law implies all the contract needed, and courts will enforce it in all cases to the extent necessary to secure the rights of the parties.

I think the judgment of the Superior Court should be affirmed.

The other justices concurred.

WHEELER *v.* NORTHERN COLORADO IRRIGATION CO.

SUPREME COURT OF COLORADO, 1887.

[10 *Col.* 582.[1]]

HELM, J. . . . The pleadings in the case at bar show that respondent is a carrier and distributer of water for irrigation and other purposes. That its canal, two years ago, was upwards of sixty miles in length and capable of supplying water to irrigate a large area of land. That relator is one of the land-owners and consumers under the canal, and can obtain water from no other source; also, that respondent has, undisposed, a sufficient quantity to supply his wants. That he tendered the sum of $1.50 per acre, the annual rental fixed by respondent, and demanded the use of water for the current season, but declined to pay the further sum of $10 per acre also demanded, and to sign a certain contract presented to him for execution. That respondent refused, and still refuses, to grant relator's request, except upon compliance with these conditions. The remaining essential facts will sufficiently appear in connection with the specific questions of law presented, as they are in their proper order discussed.

Were the constitution and statutes absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise; it has, in most instances, from the nature

[1] This case is abridged. — ED.

of things, a monopoly of the business along the line of its canal; its vocation, together with the use of its property, are closely allied to the public interest; its conduct in connection therewith materially affects the community at large; it is, I think, charged with what the decisions term a public duty or trust. In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges. And an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands would lay the foundation for judicial interference. Munn *v.* People, 4 Otto, 113, and cases cited; Price *v.* Riverside L. L. C., 56 Cal. 431; C. & N. W. R. R. Co. *v.* People, 56 Ill. 365; Vincent *v.* Chicago & Alton R. R. Co., 49 Ill. 33.

But the constitution is not silent in the particular mentioned. It evinces, beyond question, a purpose to subject this, as other branches of the business, to a certain degree of public control. As we have seen, it provides for a tribunal to which the maximum amount of water rates may be referred, in case of dispute between the carrier and consumer. And I think that, by fair implication, it forbids the carrier's enforcement of unreasonable and oppressive demands in relation to the time and manner of collecting these rates. Any other view would accuse the convention of but partially doing its work. For the fixing of maximum rates would be protection, grossly inadequate, if either of the parties might dictate, absolutely, the time and conditions of payment. The primary objects were to encourage and protect the beneficial use of water; and while recognizing the carrier's right to reasonable compensation for its carriage, collectible in a reasonable manner, the constitution also unequivocally asserts the consumer's right to its use, upon payment of such compensation.

Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject.

The contract which respondent required relator to sign and agree to comply with, as a condition precedent to the granting of his request, contains the following among other conditions: That he buy in advance "the right to receive and use water" from its canal, paying therefor the sum of $10 per acre; also that he further pay "annually in advance, on or before the 1st day in May of each year, such reasonable rental per annum, not less than $1.50 nor more than $4 per acre, as may be established from year to year" by respondent. If we hold respondent to the literal term used in this contract we must declare the $10 exaction illegal. Respondent cannot collect of relator the sum of $10, or any other sum, for the privilege of exercising his constitutional right to use water.

But counsel contended in argument that the foregoing expressions,

quoted from respondent's contract, are not intended to require the payment of $10 per acre for a right to use water. They say this $10 is merely a portion of the annual "rental" exacted of consumers in advance for the remaining years of respondent's corporate existence; that instead of requiring, say, $2.50 per acre for each irrigating season in turn, respondent has seen fit to divide this sum into two parts, collecting $1.50 annually, and the residue of $1 each for the remaining ten years of its corporate life, as one entire sum in advance.

This construction of the contract may, under all the circumstances, seem plausible, though I doubt if the courts could accept it; but if accepted the difficulty under which respondent labors would not be obviated.

If the carrier may collect a part of its annual transportation charge in advance for the remaining years of its corporate life, it may collect all. Suppose the company just organized; under counsel's view the consumer may, there being no legislation on the subject, be compelled to pay the cost of delivering water to him for the entire twenty years of its existence, before he can exercise his constitutional right during a single season.

But there is nothing in the law obliging him to cultivate his land for any particular period. He may not want the water for twenty years, or it may be utterly impossible for him to advance so large a sum at once. In fact, the majority of those who till the soil are too poor to comply with such a demand; to say that they must do so or have no water is to deprive them of their right to its use just as effectually as though the right itself had no existence. It is true these people would not themselves be able to bring water from the natural streams to their farms, and without the carrier they might be compelled to abandon their attempt at agriculture. This consideration, however, only reinforces the position that a reasonable control was intended. The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right; and we would have a constitutional provision conferring an affirmative right, subject for its efficacy in a given section to the greed or caprice of a single individual or corporation.

Besides the extraordinary power mentioned, the carrier would also, under counsel's view, be able to consummate a most unreasonable and unjust discrimination. B. could have water because he can pay for its carriage twenty years in advance; C. could not have water because he is unable to pay in advance for its carriage beyond a season or two.

But, say counsel, C.'s only remedy, and the only remedy of relator and other consumers dissatisfied with the carrier's terms, is by applica-

tion to the county commissioners. I reply: First, that so far as the present case is concerned, this suggestion embodies but little consolation. Relator's land is situate in Arapahoe county. The statute, as it stood when the proceedings described in the alternative writ took place, did not permit the commissioners of that county to act with reference to respondent's canal; while, under the constitution, the commissioners of no other county could exercise the necessary jurisdiction. It was utterly impossible, therefore, for relator to secure relief in the manner pointed out, and if the courts could not take cognizance of the alleged grievance he was wholly bereft of means of redress. I reply: Second, that the commissioners may be empowered to fix the maximum amount of the rate; that is, they may be authorized to announce a limit beyond which the carrier cannot go. In my judgment, under the constitution they cannot be vested with authority to establish the exact rate to be charged, or to specify either the time or conditions of payment. The time and conditions of payment are proper subjects for legislation. The Legislature doubtless has authority to say that the rate, whether the carrier adopt the maximum fixed by the commissioners or establish one below such limit, shall be collected annually in advance of each irrigating season; or it can make any other reasonable regulations in these respects. But the legislature itself cannot establish the unreasonable rule we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the rights secured them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition. This conclusion is not based merely upon the ground of private inconvenience or hardship; it rests, as will be observed, upon the higher and stronger ground of conflict with the beneficent purpose of our fundamental law.

A further consideration worthy of mention in passing, bearing at least upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for twenty years in advance. What assurance has he that the carrier can or will keep its engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent, for the recovery of his large advancement, upon the doubtful experiment of suit against an insolvent company.

To say that the courts may not interfere, under the circumstances above narrated, is to say that the clear intent of the constitution in relation to a constitutional right may be disregarded with impunity, simply because no express inhibitory constitutional or statutory provision on the subject can be found; also that, for a like reason, one charged with an important duty may condition its performance upon unreasonable and oppressive demands.

I do not usurp the province of the Legislature by declaring what would be reasonable requirements as to the time and manner of collecting water rates. My position is that, for the reasons given, respondent's demand of $10 per acre, as an advance payment of part of the transportation charge for the remaining years of its corporate life, is illegal as well as unreasonable and oppressive.

Respondent's enterprise is of great public importance and benefit. The original construction of its canal cost large sums of money, and its running expenses are necessarily heavy. For a considerable period the capital invested must have been unproductive. These and other circumstances may be proper subjects for consideration by the commissioners, when called upon to establish a maximum rate. And whenever they become appropriate matters for judicial cognizance, the attention deserved will be received from the courts. But no expenditure, however vast, and no inconvenience, however great, can justify or legalize the exaction, the consumer objecting, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season.

It is not necessary to consider what would have been the result had respondent charged $11.50 per acre for the irrigating season of 1886, instead of demanding $1.50 for that season and $10 per acre as part payment for future years. Neither is it necessary to speculate as to what respondent would have charged for the season mentioned had the law been understood by its officers according to the construction above given. In view of the pleadings, and especially of the language employed in respondent's contract, I think that relator, upon the showing made, was entitled to the use of water from respondent's canal for the irrigating season specified in the alternative writ. This conclusion is emphasized by the defective condition of the commissioners' statute prior to 1887, which left relator helpless so far as action by that body was concerned. I also think that *mandamus* lay for the enforcement of his rights in the premises.

The demurrer should have been overruled and the judgment must, therefore, be reversed, appellant recovering his costs.

But courts do not order the performance of impossible acts. This proceeding was instituted for the purpose of compelling respondent to supply relator with water during the irrigating season of 1886. Since then respondent may have changed its annual charge or rate; besides, the only tender or demand appearing in the record were for that season. To order compliance with relator's request for 1886 would be absurd; to order a delivery of the water for 1888 would be unwarranted. To permit an amendment of the alternative writ, so as to cover the approaching irrigating season, would be to allow the substitution, in this proceeding, of a new and wholly different cause of action and to violate an established rule of pleading.

The judgment is reversed and the cause remanded.

LOUISVILLE GAS CO. *v.* DULANEY AND ALEXANDER.

COURT OF APPEALS, KENTUCKY, 1897.

[100 *Ky.* 405.[1]]

HAZELRIGG, J., delivered the opinion of the court.

The charter of the appellant confers on it the exclusive privilege of erecting, maintaining, and operating gas works in the city of Louisville for the manufacture and sale of gas for illuminating purposes, and section 12 thereof provides that "said company shall furnish illuminating gas to private consumers who may apply therefor, under reasonable rules and regulations to be prescribed by the company, at a price not to exceed one dollar and thirty-five cents for one thousand cubic feet, less a discount of five cents per one thousand cubic feet, to all persons, including the city, except as to street lamps, paying their bills within five days after same are due."

The appellees are private consumers of the appellant's gas, and upon their refusal to pay a charge for meter rent the company was about to shut off the supply. This the appellees enjoined, relying on the provisions of the section quoted as furnishing the total charge for gas to which they could be subjected.

The meter rent is sought to be upheld as a "reasonable rule and regulation," within the meaning of those terms in the charter, and is not imposed on consumers, as appears from the answer, unless they fail to use a certain minimum amount of gas in a given month.

This process of charging rent is illustrated by the memorandum on the back of the gas bills on file, as follows: —

"METER RENT.

"3 light meter, consuming 500 cubic feet or less, 10 cents per month.

"5 light meter, consuming 800 cubic feet or less, 12 cents per month.

"10 light meter, consuming 1,000 cubic feet or less, 15 cents per month.

"20 light meter, consuming 1,200 cubic feet or less, 17 cents per month.

"30 light meter, consuming 1,500 cubic feet or less, 20 cents per month.

"45 light meter," etc.

Appellees, Dulaney and Alexander, used (in their law office) a three-light meter, and, having consumed in a given month only 200 cubic feet, were charged ten cents in addition to the regular price of the gas. Appellee Stone used a thirty-light meter (in his residence), and, having

[1] Opinion only is printed. — ED.

consumed less than 1,500 cubic feet in three given months, was charged sixty cents in addition to the price of gas.

It is averred in the answers that there are many persons in the city to whose fixtures in their houses, stores, and offices the appellant has attached its pipes, but who procure their lights from certain electric light companies, and who use the gas light furnished by the appellant only occasionally, and when by accident they are deprived of their electric lights; that these persons, therefore, use a very small quantity of gas, and are the persons mainly affected by the meter charge; that in adopting this rule to furnish gas to all who apply, however small a quantity may be demanded, and fixing a uniform charge on rent of meters when a minimum amount of gas is consumed, it has attempted in good faith to do justice to all without discrimination. A demurrer was sustained to the answer in each case, and the injunction perpetuated. In this we concur.

The gas meter is the property of the company, and is as necessary to the company in the measurement of its gas as are its works for its manufacture. At least some process of measurement is as necessary, and while other methods have been used, the meter, we believe, is regarded as the best known method, and is generally adopted. While the consumer may cause it to be inspected, and may test the accuracy of its work, his concern is only to ascertain and pay for what gas he has consumed, and cannot be called on to pay for the apparatus used in its measurement any more than he can be made to pay for the machinery used in its manufacture. He is required to pay the legal rate for the quantity consumed, and this quantity must be ascertained by the company by some correct method.

The company can only charge for the quantity it actually furnishes, and, to ascertain what it furnishes, it must measure it — how, the consumer does not care, so it is measured correctly.

The appellees, therefore, are entitled to have their gas furnished to them already measured; and, for it so measured, they can be made to pay at the price of $1.35 per thousand feet, and no more.

If the price of gas were unrestricted in the organic law of the corporation, the rule charging a higher price to small consumers might be upheld. A wholesale merchant sells for a less price than does the retailer, and this is entirely reasonable. The question would then be the ascertainment of what is a reasonable rate, and this is the question involved in the case, relied on by the appellant, of the State of Missouri *ex rel.*, &c., *v.* Sedalia Gas Light Co., 34 Mo. App. 501. There the company required the payment by the consumer of $1.25 per month when the amount of gas used was less than 500 cubic feet, and this sum was denominated "rent of meter." It was held that this charge was not unreasonable, and that while the sum fixed was designated as "rent of meter," it was in fact pay for all gas consumed by the customer to the extent of 500 cubic feet.

Presumably the company was aware when it obtained its charter and

established its monopoly that there would be small consumers as well as large ones, and there would be less profit in furnishing the one class than the other, but it did not on that account reject the charter or obtain the right to add to the price of the small consumer's bill.

The judgments are affirmed.

GOULD *v.* EDISON ELECTRIC ILLUMINATING CO.

SUPREME COURT OF NEW YORK, 1899.

[60 *N. Y. S.* 559.]

BEEKMAN, J. This action is brought for a mandatory injunction requiring the defendant to reconnect the electric light appliances in plaintiff's apartments with the conductors of the defendant, and to resume supplying the plaintiff with electric light. Damages to the extent of $500 are also demanded for the refusal of the defendant to comply with plaintiff's demand for such service. An answer has been interposed, which, among others, contains what is described as a second and separate defence to the amended complaint. To this the plaintiff has demurred for insufficiency. Without undertaking to state in full the allegations it contains, which are somewhat voluminous, it is sufficient to say that the controversy arises upon the reasonableness of one provision which the defendant requires the plaintiff to assent to as a condition of supplying him with the light desired. This provision was embodied in a paper tendered to the plaintiff for signature, described in the answer as "the usual and regular application for lighting service of the form and tenor theretofore adopted by the defendant, and required of all its customers." The stipulation in question, quoting from the answer, was that the plaintiff "would use electric current supplied by defendant for lighting his premises for the period of one year from the time at which connection between the defendant's mains and his premises should be made, and that he would pay for such electric current used by him during each month on presentation of bill at the rate of one cent per hour for each sixteen candle-power lamp, or the equivalent thereof, as measured by the meter upon the said premises for the purpose of measuring the current supplied under such application, subject to certain discounts therein set forth." It was further provided that "a minimum monthly charge of one dollar and fifty cents ($1.50) should be made by the company for each separate month during which the agreement should be in effect." It is this last provision which the plaintiff resists as unreasonable, and, if his contention in that regard is correct, the defendant had no right to require his assent thereto as a condition of performing the legal duty which rests upon it of supplying light when properly demanded. What that duty is is expressed in article 6, § 65, of the transportation cor-

porations law (chapter 566, Laws 1890), which, among other things, provides that, upon application in writing of the owner or occupant of any building or premises within one hundred feet of the wires of any electric-light corporation, and the payment by him of all money due from him to such corporation, the latter shall supply electric light as may be required for lighting such building or premises; and that if for the space of ten days after such application and the deposit, if any be required, of a reasonable sum, which the company is entitled to exact as security for the payment of its compensation, the corporation shall refuse or neglect to supply electric light as required, such corporation shall forfeit and pay to the applicant the sum of $10, and the further sum of $5 for every day thereafter during which such refusal or neglect shall continue. It is provided, however, that no such corporation shall be required to lay wires necessary to comply with such an application where the ground in which the same is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the wire required to be laid, and the expense of laying such portion.

It will be observed that the Legislature has not undertaken to regulate the price at which such light shall be supplied, nor to limit or define what compensation the corporation may exact for the service rendered by it. In that regard it is under no legal restraint, except that its charges must be reasonable and uniform. Whether, in a given case, they are so or not, is a proper subject for inquiry and determination by the court, in view of the *quasi* public nature of the business, and the duty towards the public imposed by law upon the corporation. Lough *v.* Outerbridge, 143 N. Y. 271, 277, 38 N. E. 292. The statute recognizes the right to charge for light consumed, the cost and expense of laying wires, and a rental for wire and apparatus (Transportation Corporations Law, art. 6, §§ 66, 68); but it does not assume to say what may or may not be reserved for either, nor does it require the amount charged to be separated into items with respect to its constituent elements. The law does not contemplate that the defendant shall do business at a loss. It is expected that it will, and it is entitled to, make a reasonable profit upon its venture, and the sole question in such a case as this is whether the charge made is unreasonable, considering all that the defendant is required to do to meet each customer's demand. It is stated in the fourth paragraph of the defence demurred to that the current is generated by dynamos driven by steam engines supplied with steam from boilers, all located in a station building, and, when generated, is transmitted directly to the defendant's underground conductors leading to the premises of the consumer; that each additional lamp connected with defendant's system necessitates an additional investment by it in distributing conductors and local appliances of about $20 in addition to the cost of generating and deliv-

ering the electric current; that the number of lamps which the plaintiff desired was eleven, and that the total additional investment thus made necessary in order to comply with his demand for service was at least the sum of $220. How, then, can it be said that a fixed charge, not based upon actual consumption, is of itself improper or unreasonable? The customer does not bind himself to use any particular amount of light, so that the return to the company, based on actual consumption, would rest entirely upon his volition, and it would, therefore, depend upon him whether the service he has required the corporation to be in constant and immediate readiness to render is profitable or unprofitable to the latter. But this constant condition of readiness is a necessary and unavoidable obligation, which must be sustained, in order to meet instantaneously the demand for light, which the consumer is entitled to have at any moment that he wishes it. It thus forms a part of the service to be rendered, and is an item properly to be considered when the reasonableness of the charges exacted by the company is called in question. As we have seen, the latter is not confined by statute to any specific rate, nor has any attempt been made to measure or limit the compensation which such corporations may lawfully charge, as has been done in the case of gas companies, so that they are free to exact a reasonable return for the service required, which includes, as I have said, not only the actual supply of electric light, but the readiness to supply it, coincidently with the customer's desire to have it. The only condition affecting the right is that the compensation must be reasonable, and, what is also incidental to this requirement, that it should be uniform, namely, the same for all customers similarly situated. Undoubtedly, the demand which those desiring to use it are entitled to make for electric light imports an intention on their part to consume it to some extent, and that each lamp ordered is requisite for that purpose. The charge which the defendant makes is based primarily upon actual consumption over which it has no control. One consumer with the same number of lamps will use more than another. In both cases the return to the company may be remunerative, or the use of one may be so inconsiderable as to involve a loss. To meet this contingency the monthly minimum charge of $1.50 is made. But it must be borne in mind that this payment is not in addition to the charge for actual consumption. Where light is consumed which entitles the company to payment, on meter measurement, of a sum per month equal to or in excess of the so-called minimum charge, the customer pays only for the light he has actually had; so that this fixed charge becomes practically operative only where his consumption falls below the extent of use which it measures. I can see nothing unreasonable in this when the service, as I have defined it, which the company is obliged to render, is considered. It is not a penalty for a failure to use defendant's product, but is properly to be regarded as compensatory for that part of the service which is at all times being rendered in the maintenance of the apparatus and connections through which the electric current is

made available to the customer for the production of light at his pleasure. The plaintiff distinctly refused to pay any such charge, and the defendant was, therefore, justified in refusing to supply him with light. The duty resting upon the company under the statute imports a reciprocal one on the part of the customer to pay for the service which he requires, and, where the latter refuses in advance to pay charges which appear to be reasonable, the company is under no obligation to render the service demanded. As the defence in question is sufficient upon its face, it follows that the demurrer thereto must be overruled.

The demurrer is therefore overruled, with costs, and judgment ordered in favor of the defendant accordingly.

SNELL *v.* CLINTON ELECTRIC LIGHT, HEAT AND POWER COMPANY.

SUPREME COURT OF ILLINOIS, 1902.

[196 *Ill.* 626.]

MR. JUSTICE CARTER delivered the opinion of the court:

The trial court evidently held that the law applicable to the facts as found by the jury justified the awarding of the writ, for it refused to hold the proposition of law submitted on that question by appellee, while the Appellate Court was of the contrary opinion, for it made no finding of facts different from those found by the jury and the court below. The only question here is, therefore, whether or not, upon the evidence as found, the appellee made an unjust discrimination against appellant in charging him for a transformer in addition to the regular rates for electric lighting.

There is no statute regulating the manner under which electric light companies shall do business in this State. They are therefore subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges. At common law, whether or not a difference in the treatment accorded to different patrons amounts to a discrimination must depend upon the surrounding circumstances. A mere difference does not, of necessity, constitute unlawful discrimination. Appellee in its answer to appellant's petition, avers that the purpose and office of a transformer is chiefly for the protection of the house or building connected with the electrical system; that it prevents an excessive number of volts of electricity from passing from the main street wire into the building to be lighted; that the wires usually used inside a building are much smaller than the street wires and incapable of safely carrying so many volts of electricity as pass along the street wires; that if all the vol-

tage carried on the street wires were turned into the residence, the natural consequence would probably be that the house wires would melt and the heat from the excessive voltage would cause a fire; that it is to prevent this result that a transformer is necessary. A transformer or converter is described by counsel as a coil of copper wire contained in a sheet-iron box, and is usually placed on a pole outside of the building. Its office is to reduce the current from the main line, or, rather, to induce a lesser current in the fire leading to the house for house use. In this case the voltage would have been reduced from one thousand volts to fifty or a hundred volts. It appears that without the use of a converter the effect of turning this large voltage into a house would be to burn up the wires, and in the formation of short circuits there would be a great danger of fire, and that the object of the converter is the protection of the house. It is a necessary appliance for the safe lighting of houses. The appellee had been in the habit of furnishing transformers, as needed, without any extra charge, for all houses which were wired for electricity by it, but claimed the right to charge for transformers in cases where it did not do the wiring, as it made no profit on the wiring in such cases. The transformer is just as much a necessary appliance in lighting houses as the pole on which it is fastened, or the wire that carries the electricity, or the boilers and dynamo used in generating it. It is entirely immaterial who does the wiring of the house — the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes, — just as the putting in of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them.

The jury found that the appellee had not demanded extra pay for the use of a transformer from anyone else, and that it was its general practice and custom to furnish them free to its consumers. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. While it is not bound, in the absence of statutory enactments, to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer and without unjust discrimination. In 29 Am. & Eng. Enc. of Law, 19, it is said: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the line of its mains without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates." In commenting on this, the Supreme Court of North Carolina, in Griffin *v.* Goldsboro Water Co., 30 S. E. Rep. 319, says: "If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like, could charge any rates, however unreasonable, and could at will favor certain

individuals with low rates and charge others exorbitantly high, or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. . . . The law will not and cannot tolerate discrimination in the charges of these *quasi* public corporations. There must be equality of rights to all and special privileges to none." In Cincinnati, Hamilton and Dayton Railroad Co. *v.* Village of Bowling Green, 49 N. E. Rep. 121, the Supreme Court of Ohio said: "The light and power company have acquired in the village rights that are in the nature of a monopoly. . . . Both reason and authority deny to a corporation clothed with such rights and powers and bearing such relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. . . . The company was bound to serve all of its patrons alike. It could impose on the plaintiff in error no greater charge than it exacted of others who had used its lights." In Owensboro Gaslight Co. *v.* Hildebrand and Owensboro Electric Co. *v.* Hildebrand, 42 S. W. Rep. 351, the Court of Appeals of Kentucky said: "Practically they have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city. It is therefore their duty to furnish the city's inhabitants with gas, and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices or impose different terms and conditions, according to their caprice or whim."

It has been held at common law and in the absence of statutes, in the case of common carriers, that as long as they carry at a reasonable rate for every shipper, no one can complain if they are willing to carry for others at a less rate. (5 Am. & Eng. Enc. of Law, — 2d ed. — 179.) If we apply this rule to the case at bar, it will be noticed that the appellee has demanded of appellant *more* than it has of any of its other customers. This is not the favor allowed by the common law, as just cited, but an unjust discrimination. Appellee has discriminated unjustly against appellant in any view of the law and the circumstances that we can take, and it follows that the judgment of the circuit court was right.

The judgment of the Appellate Court will be reversed and the judgment of the circuit court affirmed.[1] *Judgment reversed.*

[1] *Accord:* Ex parte Benson, 18 S. C. 38; Houston & T. C. R. R. *v.* Rust, 58 Tex. 98. *Contra:* Mobile *v.* Brenville Water Co., 130 Ala. 379; L. E. & St. L. R. R. *v.* Wilson, 132 Ind. 517; Railroad Discrimination Case, 136 N. C. 479; Scofield *v.* L. S. & M. S. R. R., 49 Oh. St. 571. — Ed.

SMITH v. CAPITAL GAS CO.

SUPREME COURT OF CALIFORNIA, 1901.

[132 *Cal.* 209.[1]]

SMITH, C. The suit was brought to recover of the defendant liquidated damages, — amounting to thirteen hundred dollars, — alleged to be due under the provisions of § 629 of the Civil Code, for refusal to furnish gas to the plaintiff. The judgment was for the defendant, and the plaintiff appeals. The provision of the code in question is, that, "upon the application, in writing, of the owner or occupant of any building or premises distant not more than one hundred feet from any main of the corporation, . . . the corporation must supply gas as required for such building or premises," &c.; and further, that "if, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages for every day such refusal or neglect continues thereafter." The case as presented by the findings is as follows: —

The defendant is a corporation engaged in supplying the city of Sacramento with gas, and the plaintiff is an occupant of premises within a hundred feet of one of its mains. September 22, 1898, the plaintiff served on the defendant a written notice, which (omitting date, address, and signature) was as follows: "You will please immediately supply me with gas for the premises occupied by me," &c. (describing them). The defendant, in reply, within ten days thereafter, "notified plaintiff that it would supply plaintiff with gas for said building and premises, if plaintiff would furnish a meter, or agree to pay defendant fifty cents per month as rent for a meter," and "plaintiff refused to furnish a meter, or to pay said rent to the defendant." The rent demanded was found by the court to be "fair and equitable," representing the monthly cost of the meter to the defendant, for care, labor, interest on investment, &c. But it is found that the defendant had no rule requiring payment of rent for meters, nor did it charge its other customers therefor. The defendant, it seems, had, prior to September 8, 1898, been supplying plaintiff with gas; but the plaintiff, during the year preceding that date, had used electrical lights mainly and almost exclusively, and the total amount of gas used on the premises amounted only to the value of $1.75; and the defendant, on that date, had removed the meter, thereby depriving the plaintiff of gas. It is found — in a passage following the statement of the above facts, and the written notice — that "said gas" was and is necessary for the plaintiff's use on the premises in question. But — unless this expression be

[1] Opinion only is printed. — ED.

construed as referring to the gas used prior to September 8, 1898, — it does not appear how much or what gas was needed.

There can be no doubt, I think, of the right of gas companies, ordinarily, to charge rents for meters. Civ. Code, § 632; Sheward *v.* Citizens' Water Co., 90 Cal. 641. But the point is made by the appellant, that, in charging him with such rent, when other consumers were not required to pay it, "the defendant arbitrarily discriminated against the plaintiff." But I do not think this is the case. Ordinarily, compensation for the meter is received from the return for the gas consumed. But here the value of the gas consumed during the year preceding the removal of the meter was not equal to a sixth part of the annual expense of the meter. The plaintiff's written demand did not specify, even in a general way, the amount of gas required, or even that he required more gas than he had been in the habit of using, Andrews *v.* North River, &c. Co., 51 N. Y. Supp. 872; and the defendant was quite justified in supposing that he required no more. Code Civ. Proc., § 1963; 1 Greenleaf on Evidence, § 41. A "state of mind once proved to exist [is] presumed to remain such until the contrary appears." 1 Greenleaf on Evidence, § 42. The case, therefore, stands as though the plaintiff's demand had been simply for the restoration of the *status quo* — *i. e.*, for the use of the quantity of gas he had been using. The plaintiff's case was therefore altogether exceptional, and, we may assume, unique. For there is neither finding nor allegation that there were any others in the same category, and if none, then there was no discrimination; and if there were any such, it devolved on the plaintiff to allege and to prove it; for to render one liable for a penalty, every material fact necessary to bring the case within the statute must be affirmatively shown. Conly *v.* Clay, 90 Hun, 20; Village of Hardwick *v.* Vermont T. and T. Co., 70 Vt. 180; 40 Atl. Rep. 169. The defendant was justified, then, in notifying the plaintiff that he would be charged with rent for the meter, if supplied by the company; and the plaintiff's refusal to agree to this was its sufficient justification in refusing to furnish gas.

I advise that the judgment be affirmed.

GRAY, C., and COOPER, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. MCFARLAND, J., HENSHAW, J., TEMPLE, J.

Hearing in banc denied.

INTERSTATE COMMERCE COMMISSION *v.* DELAWARE, LACKAWANA & WESTERN RAILWAY COMPANY.

CIRCUIT COURT OF THE UNITED STATES, 1894.

[64 *Fed.* 723.]

THIS was a proceeding, under section 16 of the act to regulate interstate commerce, by petition to enforce compliance with an order of the interstate commerce commission which directs that the railway carriers, the respondents, "wholly cease and desist and thenceforth abstain from charging, demanding, collecting, or receiving any greater compensation for the interstate transportation of window shades, plain or decorated, mounted or unmounted, when packed in boxes, than they or either of them contemporaneously charge or receive like service rendered in the transportation of commodities enumerated as third-class articles in the classification of freight articles established and put in force by them upon their several lines of railroad." The cause was heard upon the record of the proceedings before the interstate commerce commission at the complaint of Alanson S. Page and others, doing business at Minetto, N. Y., under the copartnership name of Minetto Shade-Cloth Company, and upon depositions taken in the cause.

WALLACE, C. J. The order of the interstate commerce commission which the court is now asked to enforce prohibits the railway carriers, the parties respondent, from charging any greater compensation for the transportation of window shades of any description — whether the cheap article, worth $3 per dozen, or the hand-decorated article, worth $10 per pair — than the third-class rate charged for the transportation of the materials used in making window shades. Such an order, in my judgment, ignores the element of the value of the service in fixing the reasonable compensation of the carrier, and denies him any remuneration for additional risk. I cannot regard it as justifiable upon principle, and must refuse to enforce it. The petition is dismissed.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* FLORIDA.

SUPREME COURT OF THE UNITED STATES, 1906.

[203 *U. S.* 256.]

MR. JUSTICE BREWER.

Passing all matters of a local nature, in respect to which the decision of the state court is final, the Federal question is whether the order of the railroad commission, sustained by the Supreme Court of the State, deprived the company of its property without due process of law or denied to it the equal protection of the law. The testimony taken before the commission was not preserved, but by the law of the State the rates established by such commission are to be taken in all courts as *prima facie* just and reasonable. Laws Florida, 1899, pp. 76, 82, Chap. 4700, Sec. 8. We start, therefore, with the presumption in favor of the order.

The testimony on the hearing of the application in the Supreme Court is, however, in the record. That court, in the exercise of its original jurisdiction of *mandamus* cases, determines questions of fact as well as of law. State *ex rel. v.* County Commissioners of Suwannee County, 21 Florida, 1. While it did not make any distinct findings of fact, yet its deductions from the testimony are clearly indicated by the quotations from its opinion. If it be said that in the absence of special findings of fact it is the duty of this court to examine the testimony upon which the judgment was entered, it is very clear that there was no sufficient evidence presented to that court to justify a refusal to enforce the order of the railroad commission.

And here we face this situation: The order of the commission was not operative upon all local rates but only fixed the rate on a single article, to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphate has been changed by the order of the commission. There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transporting phosphates owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which a reasonable deduction can be made as to the cost of transportation, the amounts of phosphates transported, or the effect which the rate established by the commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the State of Florida, and its judgment is *Affirmed.*

CANADA SOUTHERN RAILWAY CO. *v.* INTERNATIONAL BRIDGE CO.

PRIVY COUNCIL, 1883.

[8 *App. Cas.* 723.[1]]

BY the decree in the first appeal it was declared that the respondent International Bridge Company was entitled to certain tolls claimed by it from the appellants for the use by them of the respondent's bridge, and consequential relief.

The appellant is a corporation under the laws of the Dominion of Canada. Its railway is adjacent to the Canadian terminus of the International Bridge crossing the River Niagara. It also works a line of railway from such terminus to Lake Ontario. The International Bridge has one of its termini in the Province of Ontario and the other in the State of New York. The bridge and approaches are owned and maintained by the International Bridge Company, which is incorporated under the laws of the Dominion of Canada and also under the laws of the State of New York, and an agreement made thereunder: see an Act of the State of New York passed on the 17th of April, 1857, intituled "An Act to incorporate the International Bridge Company," and an Act of the Legislature of the former province of Canada, 20 Vict. c. 227. See further an Act of the State of New York, passed May 4, 1869, and Canadian Act, 32 & 33 Vict. c. 65, in virtue whereof an agreement or act of consolidation, dated the 18th of May, 1870, was entered into from which the International Bridge Company derived its origin.

The questions decided in this appeal are, first, as to the construction of the Acts of the Canadian Legislature, viz., 20 Vict. c. 227, sects. 14, 16, and 22 Vict. c. 124 (which amended the former act), sect. 2, as to the right to demand tolls; second, whether the tolls are reasonable or are shown to be unreasonable.

THE LORD CHANCELLOR (Earl of SELBOURNE). . . . It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made.

[1] This case is abridged. — ED.

One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to fifteen per cent. Their Lordships can hardly characterize that argument as anything less than preposterous.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Court of Appeal of the Province of Ontario should be affirmed, and both these appeals dismissed with costs.

COTTING *v.* GODDARD.

SUPREME COURT OF THE UNITED STATES, 1901.

[22 *S. C. Rep.* 30.[1]]

APPEAL from a decree of the Circuit Court of the United States for the District of Kansas dismissing a complaint in a suit to restrain the enforcement of a statute. *Reversed.*

Statement by Mr. Justice BREWER:

In March, 1897, Charles U. Cotting, a citizen of the State of Massachusetts, filed in the Circuit Court of the United States for the district of Kansas, a bill of complaint against the Kansas City Stock-Yards Company, a corporation of the State of Kansas, and certain officers of that company, and Louis C. Boyle, Attorney-General of the State of Kansas. A few days later Francis Lee Higginson, a citizen of the

[1] This case is abridged. — ED.

State of Massachusetts, filed a bill of complaint in the same court and against the same parties.

These suits were subsequently ordered by the court to be consolidated, and were thereafter proceeded in as one.

The plaintiffs respectively alleged that they were stockholders of the Kansas City Stock-Yards Company, and that the suits were brought in their own behalf and that of other stockholders having a like interest, who might thereafter join in the prosecution thereof. The main purpose of the suits was to have declared invalid a certain act of the Legislature of the State of Kansas approved March 3, 1897, entitled "An Act Defining What shall Constitute Public Stock-Yards, Defining the Duties of the Person or Persons Operating the Same, and Regulating All Charges thereof, and Removing Restrictions in the Trade of Dead Animals, and Providing Penalties for Violations of This Act."

A temporary restraining order was granted, and subsequently a motion for a preliminary injunction was made. Pending that motion the court appointed a special master, with power to take testimony and report the same, with his findings, as to all matters and things in issue upon the hearing of the preliminary injunction prayed for. 79 Fed. 679. On August 24, 1897, the special master filed his report. On October 4, 1897, the motion for a preliminary injunction was heard on affidavits, the master's report, exceptions thereto on behalf of both parties, and arguments of counsel. The motion was refused and the restraining order, which had remained in force in the meantime, was set aside. 82 Fed. 839.

A stipulation was thereupon entered into that the defendants should forthwith file their answers to the bills; that replications thereto should be immediately filed; and that the cases thus put in issue should be heard on final hearing, upon the pleadings, proofs, master's report, and exhibits, without further testimony from either party.

On October 28, 1897, after argument, the court dismissed the bills of complaint. 82 Fed. 850.

Mr. Justice BREWER. . . . In this case, as heretofore indicated, a volume of testimony has been taken, mainly upon the question of the cost and value of the stock-yards, and the effect upon the income of the company by reason of the proposed reduction. This testimony was taken before a master, with instructions to report the cost of the stock-yards, the present value of the property, the receipts and expenditures thereof, the manner of operation, and such other matters as might be pertinent for a determination of the case. Stated in general terms, his findings were that the value of the property used for stock-yard purposes, including the value of certain supplies of feed and materials which were on hand December 31, 1896, is $5,388,003.25; that the gross income realized by the stock-yards company during the year 1896, which was taken as representing its average gross income, was $1,012,271.22. The total expenditures of the company for all purposes during the same period amounted to $535,297.14, — thus indicating a

net income for the year of $476,974.08. The court, however, increased the estimate of the net income by adding to the expenditures the sum of $13,584,65, expended in repairs and construction, thus placing the net income at the amount of $590,558.73. If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896 the income of the stock-yards company would have been reduced that year $300,651.77, leaving a net income of $289,916.96. This would have yielded a return of 5.3 per cent on the value of property used for stock-yard purposes, as fixed by the master. Or if the capital stock be taken after deducting therefrom such portion thereof which represents property not used for stock-yard purposes, the return would be 4.6 per cent.

Counsel for appellants challenge the correctness of these findings, and seek to show by a review of the testimony that no such per cent of return on the real value of the investment would be received by the company in case the proposed reduction is put into effect. But, without stopping to enter into the inquiry suggested by their contention, it is enough for our present purpose to state in general the conclusions of the master and the court.

On the other hand, it is shown by the findings, approved by the court, that the prices charged in these stock-yards are no higher, and in some respects lower, than those charged in any other stock-yards in the country, and finding 37 is —

"The other stock-yards heretofore enumerated are operated generally in the same manner as those at Kansas City, and there is and was for a long time prior to March 12, 1897, active and growing competition among their owners to attract and secure to each the shipment of live-stock from competitive territories. Kansas City is the greatest stocker and feeder market in the world, and while Chicago exceeds it as a general market, yet, because of the expense of transportation from Kansas City there, and the loss in weight by shrinkage during such transportation, the live-stock shipped to and sold at Kansas City in 1896 realized for its owners more than $1,500,000 in excess of the amount which would have been realized if forwarded from Kansas City to and sold on the Chicago market."

Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the

public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?

Again, wherever a purely public use is contemplated, the State may and generally does bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain, by which property can be taken, and taken, not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and, exercising those powers and doing the work of the State, is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.

In reference to this latter class of cases, which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. He can force no one to sell to him, he cannot prescribe the price which he shall pay. He must deal in the market as others deal, buying only when he can buy and at the price at which the owner is

willing to sell, and selling only when he can find a purchaser and at the price which the latter is willing to pay. If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all State regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business.

Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the Legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law, even in respect to those engaged in a quasi-public service, independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered?

Again, the findings show that the gross receipts for the year 1896 were $1,012,271.22; that the total number of stock received during the same time was 5,471,246. In other words, the charge *per capita* was eighteen cents and five mills. So that one shipping to the stock-yards one hundred head of stock was charged $18.50 for the privileges of the yard, the attendance of the employees, and the feed furnished. While from these figures alone we might not say that the charges were reasonable or unreasonable, we cannot but be impressed with the fact that the smallness of the charge suggests no extortion. Further, as heretofore noticed, the findings show that the establishment of these yards has operated to secure to the shippers during a single year $1,500,000 more than they would have realized in case of their non-existence and a consequent shipment to Chicago, the other great stock market of the country.

"Another reason why the classification should be based upon the volume of business done is that rates which are reasonable and proper and

furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns."

If the average daily receipts of a stock-yard are more than one hundred head of cattle, or more than three hundred head of hogs, or more than three hundred head of sheep, it comes within the purview of this statute. If less than the amount it is free from legislative restriction. No matter what yards it may touch to-day or in the near or far future, the express declaration of the statute is that stock-yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling one hundred or more passengers a day to charge only a specified amount per mile for each, leaving those hauling ninety-nine or less to make any charge which would be reasonable for the service; or if we may indulge in the supposition that the Legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

Reversed.

INTERSTATE COMMERCE COMMISSION *v.* CHICAGO GREAT WESTERN RAILWAY COMPANY.

CIRCUIT COURT OF APPEALS, 1905.

[141 *Fed.* 1004.[1]]

BETHEA, C. J.

A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, Am. R. R. Rates, pp. 61 *et seq.*, 85–109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. Interstate Commerce Commission *v.* B. & O. Ry. Co. (C. C.) 43 Fed. 37, 53; Noyes, Am. R. R. Rates, 53. (2) The cost of service to the carrier would be an ideal theory, but is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. Interstate Commerce Commission *v.* B. & O. Ry. Co., *supra;* Ransome *v.* Eastern Railway Company (1857) 1 C. B. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, §§ 148, 149; Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; Interstate Commerce Commission *v.* Detroit, Grand Haven & Milwaukee Railroad Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk, and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. Interstate Commerce Commission *v.* B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General public good, including good to the shipper, the railroad company and the different localities. Interstate Commerce Commission *v.* B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities, as well as the experts, in their testimony in these cases, recognize as a very important factor. Pickering Phipps *v.* London & Northwestern Railway Company, 2 Q. B. D. (1892) 229 (this case construes section 2 of the English Act of 1854,

[1] An extract only is printed. — ED.

which is almost like section 3 of our Interstate Commerce Act); Interstate Commerce Commission *v.* B. & O. Ry. Co., *supra;* Cincinnati, New Orleans & Texas Pacific Railway Company *v.* Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission *v.* Alabama Midland Railway Company, 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414; Louisville & Nashville Railroad Co. *v.* Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309; East Tennessee, Virginia & Georgia Railway Co. *v.* Interstate Commerce Commiss on, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; Texas & Pacific Railway Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; Interstate Commerce Commission *v.* Louisville & Nashville Railroad Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047. The Supreme Court has also held that it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to the words "undue preference" by the courts of England. Interstate Commerce Commission *v.* B. & O. Ry. Co., 145 U. S. 284, 12 Sup. Ct. 844, 36 L. Ed. 699.

None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling. In every case the Supreme Court has held that competition may be controlling. In only one case has it, as a matter of fact, been held not to be a defense.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1913.

[231 *U. S.* 423.[1]]

MR. JUSTICE PITNEY delivered the opinion of the court.

It is further insisted that even the theory upon which the accounting regulations rest does not, when analyzed, justify a charge of abandoned property to operating expenses, but at most a charge to profit and loss. The suggestion apparently has force; but, upon consideration, we are unable to see that it furnishes ground for judicial interference with the course pursued by the Commission. Except for the contention (already disposed of) that the value of the abandoned parcels should be permanently carried in the property account as part of the cost of progress, it is and must be conceded that sooner or later it must be charged against the operating revenue, either past or future, if the integrity of the property accounts is to be maintained; and it becomes a question of policy whether it should be charged *in solido* to profit and loss (an account presumptively representative of past accumulations) or to the operating accounts of the present and future. If abandoned property is not charged off in one way or the other it remains as a permanent inflation of the property accounts, and tends to produce, directly or indirectly, a declaration of dividends out of capital. If it be charged off to the surplus account, it tends to prevent the declaration of dividends based upon a supposed accumulation of past earnings. If charged to operating expenses of the current and future years, it has a tendency to prevent the declaration of dividends from current earnings until the amount of the depreciation shall have been made up out of the earnings.

[1] Only one point is printed. — ED.

OPINION OF THE JUSTICES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1919.

[231 *Mass.* 603.[1]]

We are of opinion that that act was constitutional and for these reasons: The means of transportation for people at large is a matter of public interest. In earlier times turnpikes and toll bridges in private ownership and management afforded facilities for travel. Gradually these mostly have been taken over by counties, cities and towns and the tolls abolished. Andover & Medford Turnpike Corp. *v.* County Commissioners, 18 Pick. 486. Murray *v.* County Commissioners, 12 Met. 455. Central Bridge Corp. *v.* Lowell, 4 Gray, 474; S. C. 15 Gray, 106. The ownership and operation of a ferry by a municipality contravenes no constitutional limitation. Attorney General *v.* Boston, 123 Mass. 460. Steam railroads in their last analysis are highways for the use of the public. The Commonwealth has in several instances lent its aid to the construction of such railroads. See Kingman, petitioner, 153 Mass. 566, 570, for references to statutes. Numerous special statutes and finally a general law have been enacted authorizing cities and towns to subscribe for stock of railroads. Kittredge *v.* North Brookfield, 138 Mass. 286. Commonwealth *v.* Williamstown, 156 Mass. 70. Such legislation is constitutional. Prince *v.* Crocker, 166 Mass. 347, 361. The Commonwealth contributed toward the construction of the Hoosac Tunnel and ultimately acquired the ownership and assumed the management of the Troy and Greenfield Railroad. Troy & Greenfield Railroad *v.* Commonwealth, 127 Mass. 43. Amstein *v.* Gardner, 134 Mass. 4. Nearly forty early statutes incorporating street railways contained a section whereby the municipality within which such railway was constructed might acquire its property. The construction of the Boston subway for street railway purposes was held a public use for which money raised by taxation lawfully might be expended. Prince *v.* Crocker, 166 Mass. 347. The same is true of the East Boston Tunnel. Browne *v.* Turner, 176 Mass. 9. Property invested in street railways by private investors has been held to become thereby affected with a public interest. Donham *v.* Public Service Commission, 232 Mass. 309. It has been decided in other jurisdictions that the construction, acquisition and operation of street railways may be made a municipal function.

[1] This opinion was unanimous; the full statement of the proposed enactments submitted which prefaces this opinion is omitted. — ED.

PENNSYLVANIA RAILROAD *v.* PHILADELPHIA COUNTY.

SUPREME COURT OF PENNSYLVANIA, 1907.

[220 *Pa. St.* 110.[1]]

Opinion of MR. CHIEF JUSTICE MITCHELL.

But independently of this, true business principles require that the passenger and freight traffic not only may, but should be separately considered. The intelligent business of the world is done in that way. Every merchant and manufacturer examines and ascertains the unprofitable branches of his business with a view to reducing or cutting them off entirely, and there is no reason why a railroad or other corporation should not be permitted to do the same thing as long as its substantial corporate duties under its franchise are performed. While the public has certain rights which in case of conflict must prevail, yet it must not be forgotten that even so-called public service corporations are private property organized and conducted for private corporate profit. And unless necessary for the fulfillment of their corporate duties they should not be required to do any part of their business in an unbusinesslike way with a resulting loss. If part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest. To concede that principle would, as the court below indicated, permit the legislature to compel the carriage of passengers practically for nothing though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap. The corporation is entitled to make a fair profit on every branch of its business subject to the limitation that its corporate duties must be performed even though at a loss. What is a fair profit is, as already said, a highly complicated and difficult question. The learned court below availed themselves of all the best evidence that was offered or shown to be attainable, considered it with exemplary patience and care, and their conclusion that the enforcement of the Act of 1907 against the complainant would do injustice to the corporators is beyond just criticism.

Decree affirmed.

[1] Only the concluding part of the opinion is printed. — ED.

THE MINNESOTA RATE CASES.

SUPREME COURT OF THE UNITED STATES, 1912.

[230 *U. S.* 352.[1]]

MR. JUSTICE HUGHES delivered the opinion of the court.

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of state lines.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount Constitutional power.

[1] Only an extract is printed. — ED.

GLOUCESTER WATER SUPPLY CO. *v.* GLOUCESTER.

SUPREME COURT OF MASSACHUSETTS, 1901.

[179 *Mass.* 365.[1]]

PETITION to determine the value of the petitioner's water plant purchased by the respondent on September 24, 1895, under St. 1895, c. 451, § 16, filed October 29, 1895.

Commissioners were appointed under the provisions of the act, who reported that the value of the plant, exclusive of any allowance for the franchise and rights other than the water rights of the company, and excluding all evidence as to the past earning capacity of the company, was $600,500, and that the petitioner should recover that amount with interest from September 24, 1895, less the sum of $3,955.40, which it was agreed should be deducted therefrom.

LORING, J. . . . It will be convenient to consider the respondent's contention that the commissioners had no right to award the $75,000 allowed by them in addition to the cost of duplication of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence.

The act under which the award was made (St. 1895, c. 451) is an act enabling the city of Gloucester to "supply itself and its inhabitants with water." By § 16 of that act, that right is made conditional on its, the city's, purchasing the property of the water company in case the water company elects to sell its property to the city. In case the city agrees to buy the water company's property, under an offer of the water company made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof. . . . Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company."

In determining the true construction of these provisions of § 16, it is important to bear in mind the purpose, which the Legislature had, in making the right of the city to supply itself with water conditional on its buying the company's property, in case the company elected to sell it to the city, and in providing that in ascertaining the "fair value" of that property, it should not be enhanced "on account of future earning capacity, or future good will, or on account of the franchise of said company."

On the one hand, it is plain that a private water company organized for net profits cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the Legislature had not required the city to buy the

[1] This case is abridged. — ED.

water company's property, the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in § 16 providing that the value shall not be enhanced "on account of the franchise of said company." The franchise of the Gloucester Water Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water Supply Company; and finally, the sale to the city was not obligatory on the water company. The company was given the option of selling its property to the city or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property, which the city is compelled to buy, ought not to be enhanced "on account of the franchise of said company."

It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the past earnings of this company were not evidence of the "fair value" of this property. The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a criterion of the "fair value" of the property apart from an exclusive franchise. We are of opinion that the evidence of past earnings offered by the water company was properly excluded. Newburyport Water Co. *v.* Newburyport, 168 Mass. 541.

It is argued by the petitioner that the admissibility of such evidence derives support from St. 1891, c. 370, § 12, which provides that in determining the "fair market value" of a gas or electric plant under similar circumstances "the earning capacity of such plant based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant" is to be included "as an element of value;" but this clause as to the earning capacity being considered as an element of value was omitted from the act in question.

The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant is whether the principles on which the commissioners proceeded were sufficiently favorable to the water company.

It is plain that the real, commercial, market value of the property of the water company is, or may be, in fact, greater than "the cost of duplication, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant: Suppose a manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern; it will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. National Waterworks Co. *v.* Kansas City, 62 Fed. Rep. 853.

We think it is plain that there is nothing in the provisions of § 16 of the act in question, St. 1895, c. 451, forbidding the commissioners considering this element of value which, as we have seen, in fact exists. The provisions of the act are that the "fair value . . . shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good will, apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value, which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute.

It is also plain that the commissioners, in allowing the $75,000 allowed by them in addition to the cost of duplication, less depreciation, of the plant in its physical features, did not go beyond this. They state that in their opinion "the cost of duplication, less depreciation, of the different features of the physical plant, . . . does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city in purchasing it, without considering its income or right to do business, but having the power to carry it on on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value that we have found to be seventy-five thousand dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it." *Report affirmed.*

BRYMER *v.* BUTLER WATER CO.

SUPREME COURT OF PENNSYLVANIA, 1897.

[179 *Pa. St.* 231.[1]]

WILLIAMS, J. . . . A provision in the third section of the Act of June 2, 1887, relating to the jurisdiction of the courts over gas and water companies is supplemental to the Act of 1874, and defines somewhat more distinctly the duty of such companies to furnish the public with pure gas and water, but it contains no allusion to the subject of price. The power of the court to interfere between the seller and the buyer of water is conferred only by the provisions already quoted from the Act of 1874; and that act authorizes the court to entertain the

[1] This case is abridged. — ED.

complaint of the buyer, to investigate the reasonableness of the price charged, and to "dismiss the complaint," or to order that the charges complained of, if found to be unreasonable and unjust, "shall be decreased." The water company prepares its schedule of prices in the first instance, and makes its own terms with its customers; but if these are oppressive, so that in the exercise of the visitorial power of the State the just protection of the citizen requires that they be reduced, then the court is authorized to say "this charge is oppressive. You must decrease it. You are entitled to charge a price that will yield a fair compensation to you, but you must not be extortionate." This is not an authority to manage the affairs of the company, but to restrain illegal and oppressive conduct on its part in its dealings with the public. It may be that the power to order that any particular item of charge shall "be decreased" includes the power to fix the extent of the reduction that must be made, or to name the maximum charge for the particular service in controversy, which the court will approve, but the decree is that the item shall "be decreased" either generally or to a sum named. The schedule of charges must be revised accordingly by the company defendant, and such revision may be compelled in the same manner that the decree of the same court may be enforced in other cases.

We do not think this supervisory power would justify the court in preparing a tariff of water rents and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property, and the business of a solvent corporation, from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The Act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizen from extortionate charges specifically pointed out and complained of by petition. This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. In determining the amount of the investment by the stockholders it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money

should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase of stock that is fictitious, and represents no value added to the property of the corporation, such stock is rather in the nature of additional income than of additional investment. This whole subject was brought to the attention of the learned judge by a request that he should find as a matter of law that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying in reply to the request, "we have no authority for such a ruling, and it would be unjust to the consumer who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction."

This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just. Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be the very least at which the water could be afforded in the other. The law was correctly stated in the defendant's request, and the court was in error in refusing it. But we think the court had no power to adopt for, and enjoin upon, the company a comprehensive schedule like that incorporated into the decree in this case. The decree found that the water supply furnished by the defendant company was abundant and "reasonably pure and fit for public use," but, without any adjudication that any particular charge or charges complained of were excessive and must be decreased, he made a decree that "the water rates of the defendant company from March 1, 1896, to be charged and collected from the plaintiffs for water by the defendant company to the plaintiffs shall be as follows:" Then follows a table filling two and a half pages of the appellant's paper-book, and providing specifically for domestic rates, for livery, hotel, and trading stables, for hotels and boarding houses, for fountains, steam engines, schools, motors, public buildings, special rates, and meter rates, subject to provision that "when the water" which the same decree had just pronounced to be reasonably pure and suitable for domestic use

"is properly filtered the charges may be increased twenty per cent." The school district of Butler was not a party complainant in this case, nor was the county of Butler, but both were taken under the protection of the court and specifically provided for by the decree. Fountains are luxuries. The question whether the police power of the State can be successfully invoked to cheapen the price of water furnished for purposes of display or the mere gratification of one's taste, is at least open to discussion, but, without discussion, it is disposed of by this decree, and the price reduced. In short, upon a general complaint that the rates charged by the defendant were too high, without specification of the particular charges that were alleged to be excessive, the court has undertaken to revise the entire schedule of prices, and instead of directing the company to decrease the objectionable charges, has formulated an entirely new schedule of prices, covering all of the business of the company. This new schedule it has framed upon the mistaken basis adopted and stated in the third conclusion of law already considered. This action is not authorized by the Act of 1874. It is not the hearing of a complaint against the charges made by the company and a decision of the controversy so arising, but it is the assumption of a power to frame a schedule of prices covering the entire business of the company, with all its customers, many of whom are not even complaining of the rates paid by them. The framing of such a general schedule is ordinarily the right of the company. The correction of this schedule when framed, whenever it may work injustice and hardship is the prerogative of the court, and one which should be fearlessly exercised.

For reasons now given this decree cannot be affirmed, but under the peculiar circumstances surrounding this case we cannot enter a simple decree of reversal.

STEENERSON *v.* GREAT NORTHERN RAILWAY CO.

SUPREME COURT OF MINNESOTA, 1897.

[69 *Minn.* 353.[1]]

THE plaintiff, Elias Steenerson, in 1893 filed a complaint with the Railroad and Warehouse Commission, complaining that the tariff of charges of the Great Northern Railway Company for the transportation of wheat, oats, barley, and other grains from Crookston, Fisher, and East Grand Forks, to the terminals Minneapolis, Duluth, and St. Paul, were unjust and unreasonable, in that they were at least one-third too high, and asked that the same be reduced to and fixed at twelve cents per hundred pounds between Crookston and either of said terminals,

[1] This case is abridged. — ED.

and between other stations on said railway and said terminals in proportion, or to a just and reasonable rate. The defendant company made answer to such complaint, admitted the existence of charges as alleged in the complaint, and alleged that its rates and charges, "including those in question," were in all respects reasonable and just.

MITCHELL, J. . . . 1. It must now be accepted as the settled law that, when rates of charges by railway companies have been fixed by the legislature or a commission, the determination of the question whether such rates are "reasonable" or "unreasonable" is a judicial function. But this is so, not because the fixing of rates is a judicial function (for all the authorities agree that it is a legislative one), but solely by virtue of the constitutional guaranty that no one shall be deprived of his property without due process of law. Therefore the only function of the courts is to determine whether the rates fixed violate this constitutional principle.

Courts should be very slow to interfere with the deliberate judgment of the legislature or a legislative commission in the exercise of what is confessedly a legislative or administrative function. To warrant such interference, it should clearly appear that the rates fixed are so grossly inadequate as to be confiscatory, and hence in violation of the constitution. It is not enough to justify a court in holding a rate "unreasonable," and hence unconstitutional, that, if it was its province to fix rates, it would, in its judgment, have fixed them somewhat higher. Any such doctrine would result, in effect, in transferring the power of fixing rates from the legislature to the courts, and making it a judicial, and not a legislative, function. When there is room for a reasonable difference of opinion, in the exercise of an honest and intelligent judgment, as to the reasonableness of a rate, the courts have no right to set up their judgment against that of the legislature or of a legislative commission. In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory. This seems to be substantially the doctrine suggested in Spring *v.* Schottler, 110 U. S. 347–354, 4 Sup. Ct. 48, which, so far as I can discover, is the first case in which that court suggested any modification or limitation of the doctrine of the so-called "Granger Cases." And I think it is the doctrine which the courts must finally settle down on, unless they are prepared to assume the function of themselves fixing rates.

2. What is a reasonable rate is a most difficult question, and it is doubtful whether any single rule for determining it can be laid down that would be complete, and alike applicable to all cases. But as good a general rule as I have found is that stated by counsel for the Northern Pacific Railway Company in this case, to wit:

"If a railroad is built and operated wisely and economically; if it is located where public need requires it, where there is business to justify its existence, and constructed so as to be fit and well adapted for the

business which it aims to accommodate, — it should be entitled to return as good interest [on the cost of the reproduction of the road] as capital invested in the average of other lines of enterprise."

It seems to me that it follows, as corollaries from this rule, that — First, the cost of reproduction must be estimated on a present cash basis, and that it can make no difference whether a road was originally built with cash capital paid in by the stockholders, or with borrowed money secured by mortgage on the property; and, second, a rate may be reasonable during times of general financial and business depression, when capital invested in all lines of enterprise is yielding a small return, which would be unreasonable in prosperous times, when capital invested in business enterprises is yielding a much larger return. There is no constitutional principle which guarantees the capital invested in railroads immunity from business vicissitudes to which capital invested in all other enterprises is subject. These propositions are fully discussed in the opinion. The courts should take notice of the general depression in business prevailing in 1894.

3. Where capital (including labor) invested in the production of any article or commodity is comparatively unremunerative, yielding but a small return, a rate for the transportation of such article or commodity may be reasonable, although, if the carrier was required to do all his business, at rates fixed on a corresponding basis, such rates would be unreasonable, to the extent of being confiscatory. This is but an enlarged application of a principle already suggested. It is a principle upon which railroads themselves act every day in fixing rates, recognizing as they do that rates are largely dependent upon competition among producers or shippers. Of course, this proposition has its limitations, but it is unnecessary to discuss them here. The courts, I think, should take notice of the small profit in raising grain in Minnesota in and about 1894, owing to the comparatively low prices then prevailing.

I will not go into any discussion of the evidence, or any analysis of the labyrinth of figures and estimates presented in the testimony. That has been very exhaustively, and, as I think, correctly, done by Justice CANTY. Applying the rules I have suggested to the evidence, I do not think any court would be justified in holding that the railroad company has satisfactorily proved that the rates fixed by the commission for the transportation of grain are "unreasonable;" that is, if enforced, they would be confiscatory.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1907.

[206 *U. S.* 414.[1]]

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree enforcing an order of the Interstate Commerce Commission requiring carriers to desist from charging an increased freight rate on lumber. Affirmed.

MR. JUSTICE MCKENNA. This comment, it may be said, is not applicable to the ninth and tenth propositions of appellants, as they present propositions of law which were not only disregarded by the Commission, but the antithesis of them was asserted in the eighth finding. This contention must be specifically considered. The Commission finds that the net and gross earnings of the appellants have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included "expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars." The Commission expressed the opinion that such expenditures should not be charged to a single year, but "should be, as far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'" And it was said: "If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent." The exact effect of the difference of view between appellants and the Commission as to operating expenses there is no test; but it cannot be said, even if the commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year.

[1] Only one point is printed. — ED.

LONG BRANCH COMMISSION *v.* TINTERN MANOR WATER COMPANY.

COURT OF CHANCERY OF NEW JERSEY, 1905.

[70 *N. J. Eq.* 71.[1]]

ACTION by the Long Branch Commission against the Tintern Manor Water Company, to restrain defendant from cutting off water supply to the city of Long Branch, and to fix reasonable rates for such supply. Decree for complainant.

PITNEY, V. C. The supplying company is, as we have seen, under obligation to keep in advance of the present demand and take liberal account of the probable increase of demand due to increase of population. I think the language of Mr. Justice DIXON, in Slingerland *v.* Newark, 54 N. J. Law, 62, at page 69, 23 Atl. 129, at page 131, is apt on this point: "It would, of course, be absurd for the city to construct water works adequate only for its present wants, and the prosecutor does not assert that the works now contemplated are unreasonably large in view of the city's prospective growth." This is in strict accord with what was said (and above referred to) by Justice VAN SYCKEL, in Olmstead *v.* Morris Aqueduct, 47 N. J. Law, 329, as follows: "In a matter of extreme necessity all contingences must be provided for, and the supply must be so ample that a lack of water cannot be apprehended." To the same effect are the more extended remarks of Judge PARKER in the Supreme Court in the same case, reported in 46 N. J. Law, 500. The learned judges in these cases were discussing the question of necessity for the exercise of the eminent domain. The argument from such premises to the present is *a fortiori*. These considerations lead to the conclusion that the water company when it starts with new works, or a large addition to the original supply, is entitled to an income therefrom somewhat greater than what is due to the cost of work sufficient merely to meet the present demands. I say "somewhat greater" for I do not mean to be understood as holding that capitalists ought to expect an immediate compensatory income from an enterprise of this character. But on the other hand it would be manifestly unjust to expect them to invest their money in a plant necessarily larger than present demands require and take as an income therefor such a sum as would satisfy an investment sufficient to meet present demands. For here comes in again,

[1] This opinion so elaborately discusses the testimony that it was thought to be too unwieldy for inclusion here. The analysis of his problem with which the vice chancellor begins this discussion is particularly noteworthy. "First. What annual compensation ought the defendant to have for the supply of water which it is giving, and agrees to continue to give, to the inhabitants of the territory covered by the Long Branch Commission? Second. How shall that compensation be distributed between the municipality, as such, for public purposes on the one hand, and the private consumers on the other? Third. As between the private consumers themselves?" On the point of proper capitalization there is one point for which the case will often be quoted; and an extract from the introduction to this is included. — ED.

with great force, the consideration previously mentioned, that the municipality cannot bind itself for more than 10 years; and, in fact, need not bind itself at all for any period, and it holds in its hands the absolute power to oust the water company at any time it shall so choose and may exercise that power as soon as by the increase of population and demand, the investment by the capitalists shall have become actually profitable.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *v.* STOREY ET AL.

CIRCUIT COURT OF THE UNITED STATES, 1906.

[149 *Fed.* 499]

ON demurrers to bills to enjoin the schedule of passenger rates prescribed by the railroad commission.

MAXEY, District Judge. 8. The ninth demurrer challenges the right of the plaintiff, as claimed in paragraph 10 of the bill, to earn an amount sufficient to provide a sinking fund for the discharge of its indebtedness, in addition to paying the interest thereon. This claim of the plaintiff was doubtless based upon the decision of the Supreme Court of Pennsylvania. See Brymer *v.* Butler Water Co., 179 Pa. 251, 36 Atl. 249, 36 L. R. A. 260. With due respect for the opinion of that high tribunal, this court is unable to concur in the view expressed by it, and therefore sustains the demurrer.

WILLCOX ET AL CONSTITUTING THE PUBLIC SERVICE COMMISSION OF NEW YORK *v.* CONSOLIDATED GAS COMPANY.

SUPREME COURT OF THE UNITED STATES, 1909.

[212 *U. S.* 19.[1]]

THE appellee, complainant below, filed its bill May 1, 1906, in the United States Circuit Court for the Southern District of New York

[1] Only a part of the opinion is printed. — ED.

against the city of New York, the Attorney General of the State, the District Attorney of New York County and the Gas Commission of the State, to enjoin the enforcement of certain acts of the legislature of the State, as well as of an order made by the Gas Commission, February 23, 1906, to take effect May 1, 1906, relative to rates for gas in New York City.

MR. JUSTICE PECKHAM. We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884 as conclusive at that time. The valuation was provided for in the act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.

But although the State ought, for these reasons, to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchises. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchises. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum the great value of the franchises would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase. The question of the regulation of rates did from time to time thereafter arise in the legislature and finally culminated in these acts which were in existence when the court below found this increased value of the franchises. We cannot, in any view of the case, concur in that finding.

MILWAUKEE ELECTRIC RAILWAY AND LIGHT CO. *v.* CITY OF MILWAUKEE.

CIRCUIT COURT OF THE UNITED STATES, 1898.

[87 *Fed.* 577.[1]]

FINAL hearing in two actions, — one wherein the street railway company is complainant, and the other brought by the trustee for the bondholders, — each seeking a decree declaring null and void, in respect of the complainant, a purported ordinance of the defendant city entitled "An ordinance to regulate the rate of fare upon the street railways in the city of Milwaukee, and providing for the sale of packages of tickets thereon," approved June 11, 1896, and to perpetually enjoin its enforcement.

SEAMAN, District Judge. . . . The difficulties presented in this case do not, therefore, rest in any doubt as to the general principles which must be observed, nor in ascertaining the actual facts disclosed by the testimony as a whole, so far as material to this controversy. Although the testimony on the part of complainant makes a volume of 1,445 printed pages, and that of the defendant 163 pages, the only substantial contentions of fact relate to items of expenditure and claims of credit by way of depreciation, presented on behalf of the complainant as entering into the showing of net revenue, and to the present or reproduction value of the plant. And it may be remarked, in passing, that this testimony is so well classified and indexed, with such fair summaries in the briefs, that the task of examination has been materially lightened. But the sole embarrassment in the inquiry arises from the wide divergence which appears between the actual and undisputed amount of the cash investment in the undertaking, and the estimates, on either hand, of the amounts for which the entire plant could now be reproduced, in the view that the line of authorities referred to does not attempt to define or specify an exact measure or state of valuation, and leaves it, within the principles stated, that "each case must depend upon its special facts." Therefore the twofold inquiries of reasonableness above indicated are of mixed law and fact, and start with the presumption, in favor of the ordinance, (1) that the prevailing rates exacted too much from the public, and (2) that those prescribed are reasonable.

1. Are the terms and rates fixed by the company excessive demands upon the public, in view of the service rendered? The Milwaukee Street Railway Company, of which the complainant is the successor in interest, was organized in December, 1890, for the purpose of establishing an electric street railway system, which should cover the entire field for the city of Milwaukee. There were then in operation

[1] This case is abridged. — ED.

five distinct lines, owned separately, operated mainly by horse or mule power, each charging separate fares, and having no system of transfers. It is conceded that the service was slow and antiquated, was not well arranged for the wants of the city, and was generally inadequate and unsatisfactory. As the old lines occupied the principal thoroughfares, and the public interest prevented the allowance of double lines in such streets, the improvement could not be made effective unless those lines were purchased, or in some manner brought into the proposed system. They were gradually acquired, at prices which may appear excessive when measured by results, and during the ensuing period of about three years the work of installing the new system was carried on, involving an entire reconstruction and rearrangement of the old lines and extensions, and new and improved equipments throughout, at an expenditure of over $3,000,000, aside from the cost of the old lines. As a result, at the time the ordinance was adopted, the mileage of tracks had increased from the previous aggregate of 110 miles to 142.89 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system, — a feature of special value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement. The service was improved in speed and regularity 50 per cent or more, with better cars and less inconvenience, and it appears beyond question that it was generally more satisfactory and economical from the standpoint of the public. In other words, the service was materially enhanced in its value to the public, without any increase in either normal or maximum charges, affording rides for five cents which had previously cost two and even three fares; and against all these advantages there appears only a single benefit extended by three out of the five constituent companies which is not given under the new arrangement, namely, in the sale of commutation tickets, — an omission for which there seems to be plausible excuse and offset in the universal system of transfers, aside from the other advantages. Surely, therefore, no imposition upon the public appears through any comparison between the old and the new service and rates. Nor does it find any countenance in comparison with either service or rates which prevail in other cities, for it is shown in this record, and is undisputed, that the five-cent rate is almost universal; that commutations are exceptional in cities of like class, and arise out of exceptional conditions, which are not fairly applicable here; and that instances of lower rates are so clearly exceptional that they cannot have force for any affirmative showing of reasonableness in the instant case. Nevertheless, with the burden of proof on the defendant, these considerations are not controlling, unless it further appears that the earnings of the company are insufficient, in view of the amount which may justly be regarded as the investment in the undertaking, to warrant the making of rates and terms which are more advantageous to the public. The interests of the public in its highways are paramount, and, if the service

can reasonably be afforded more cheaply in Milwaukee than in other cities of like class, the community is entitled to the just benefit of any possible conditions which may tend to that result. The issue in that regard must be met under the second branch of inquiry, but I am clearly satisfied that this first question must be answered in favor of the complainant, if the evidence sustains its claim that lower rates would be confiscatory, and not compensatory.

2. Are the earnings of the property insufficient, in view of all the conditions, to justify this reduction in the rates of fare? Solution of this inquiry depends upon the showing (1) of earning capacity at existing rates, and (2) of the "amount really and necessarily invested in the enterprise," and upon the conclusion (3) whether the ratio of return upon the investment is excessive. In the statements which are referred to both parties have adopted a ratio, so far as necessary, to separate the electric lighting plant owned by the complainant, so that the statements which follow relate exclusively to the street railway plant, except where otherwise mentioned.

First. The question of earning capacity is confined by the testimony to the results of three years' operation, being after the system was fairly installed, and inclusive of the year in which the ordinance was adopted, namely, 1894, 1895, and 1896. It is suggested on behalf of the defendant that those years were exceptional, for one cause and another, and are not a fair criterion for future earnings under more favorable circumstances; but the suggestion is without force in this case, because the ordinance operates upon these very conditions, and must, of course, be predicated upon them, — upon existing facts, and not upon mere future possibilities, — and, so determined, the instant case cannot affect rights under new conditions.

The proofs on the part of the complainant furnish, in detail, from the books of account, the gross earnings, the various items of expense and of charges for which deduction is claimed, excluding any payments of, or allowance for, interest on the bonded indebtedness, and state the net earnings as follows: In 1894, $64,868.77; in 1895, $269,202.30; in 1896, $100,628.81. In this showing it appears that deduction of $247,324.88 is made in 1894 for "depreciation," being the amount apportioned in that year to meet the alleged annual loss by physical depreciation of the plant, to keep the capital intact. No such deduction is made in 1895 and 1896, because not shown in the books, although it is insisted that like credit is due in each year, for the purposes of this case.

The defendant concedes the correctness of the showing as to the gross earnings, but disputes certain large items for which deductions are made in the above statement, corrects some items, and denies that any allowance should be made for depreciation. Aside from the fact that reports and statements of financial condition made from time to time by the company omit many of the deductions here asserted, these contentions on the part of the defendant rest solely upon the books of

account kept by the company, and the testimony of Mr. De Grasse, stating his conclusions as an expert accountant from examination of such books, with the following result as to net earnings: In 1894, $387,074.70; in 1895, $479,621.11; in 1896, $66,520.99. But this total for 1896 erroneously includes an allowance of $160,550 paid for interest on bonds, which should be excluded on the basis assumed, and would make the net earnings for that year, on his computation, $227,070.99. In this statement the allowance for depreciation in 1894 is excluded by Mr. De Grasse, because that item was in fact charged off upon change in the system of bookkeeping. He also excludes large amounts of undoubted expenditures upon the hypothesis that they belong to "construction account," as covering permanent improvements, and not to "expense of maintenance," as stated; rejects certain payments as accruing on account of previous years, and certain sums apportioned and charged off to meet damage claims; and makes corrections as to taxes, for which the book entries were made in advance upon estimates by way of apportioning the expenses of the year, pending litigation and other causes. However valuable this testimony is for analysis of the bookkeeping methods and for correction of certain charges, it is clearly insufficient, without other support, to contradict the undisputed testimony, both positive and expert, on the part of complainant, which verifies substantially its contention upon the disputed subjects of deduction, namely, that the expenditures so charged were largely, if not wholly, of such nature as to justify deduction for "maintenance;" and that depreciation is a well-recognized fact in all such plants, for which allowance must be made to save the capital from impairment, without regard to any question of its entry upon the books.

Making allowances for maintenance alone, in accordance with the analysis presented by the expert witnesses Goodspeed, Coffin, McAdoo, and Beggs, taking in each instance the estimate most favorable to the defendant, I am satisfied that the defendant's claim of net earnings must be materially reduced, and that the largest amounts which can be assumed upon its theory, excluding any allowance for depreciation (except that for 1894 the "maintenance" allowance is increased, to bring it — the general allowance — up to the minimum estimate by the experts), would approximate the following sums:

In 1894	$230,000
In 1895	340,000
In 1896	115,000
	$685,000

— making the average earnings per year, say, $228,333.

In reference to the element of depreciation, the witness Beggs gives the following explanation:

"I think experience has demonstrated that the utmost life that can be expected from the best road-bed that can be laid to-day would be,

at the outside, ten to twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition to-day, because of the different periods that their track went down, and due to the fact that it was not all put down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee Company must do this year, which, as a matter of fact, it is doing, what it did last year, — in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the minimum it has now, of 240 equipments; because I think it is fair to assume that the average life of the double equipment, taken as a whole, will not exceed twelve years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years, — I mean the car bodies; but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 20 equipments annually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain — to operate — the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment."

For the causes thus stated, within general rules which are well known, it is manifest that this element must be taken into account before it can be determined that earnings derived from a plant are excessive; and in the same line there is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924. The latter item, if allowed, would be a matter of simple computation; but a just measure of physical depreciation seems, to some extent, although only partially, involved in provisions for maintenance, and, while the testimony is very full and instructive upon this subject, it does not clear the case from serious difficulties in the way of stating a definite ratio or sum for such allowance. I am, however, clearly of opinion that neither of these elements is essential to the determination of the issues upon any aspect presented by the testimony, and that depreciation may be left to serve as an important factor of safety, in either view.

Second. As to valuation: For purposes of the company, the value of the property, including both railway and lighting plants, appears to have been placed at $14,250,000, represented by the issue of bonds for $7,250,000; preferred stock, $3,500,000; and common stock $3,500,000; but this aggregate was clearly excessive, after excluding the electric lighting department, and on no view can it be taken as the basis for the present consideration. The statements of the actual cost of the constituent street railway properties, including the cash investment for improvements, are necessarily complicated, from the fact that

payments were partly made in stocks and bonds, and the aggregate amount varies according to the ratio of valuation placed upon the bonds alone, — in two statements in which the stock is excluded, and in one statement which values both stock and bonds, — the minimum being $9,024,107.85, and the maximum $11,313,829.84. The former amount was subsequently modified (page 465, Complainant's Proof), making the statement of cost $8,885,644.17; and as this excludes any valuation of stock, and places the value of the bonds at the discount agreed upon between the parties, which also seems fair, it may justly be taken as representing the true amount invested. But adoption of this purchase amount does not meet the issue, as it is the value of the investment, and not the amount paid, which must control. On the other hand, both parties introduce testimony placing valuations upon the various items of the plant as it exists in fact, upon the basis of its reproduction value. This amount, as stated by the witnesses for complainant, aggregates $5,153,287.76; while, on the face of defendant's proofs, the value of the tracks and equipment is placed at $2,358,799; the real estate and buildings being valued separately, and the highest valuation of the real estate being $236,949, and of the buildings $208,449, making the aggregate $2,804,197. It appears, however, that these estimates on behalf of the defendant omit 27 miles of track, many parcels of real estate, and other items, so that counsel for defendant concedes that this aggregate should be increased to $3,679,631. The wide difference in these amounts is mainly due to divergence in the estimates upon tracks and equipment. So the amounts on real estate and buildings, after allowance for the omissions, would appear higher on the valuations submitted by the defendant than those of the other side. For the valuation of tracks and equipment, the defendant relies upon the estimate made by Mr. Partenheimer, a witness of apparent ability and experience as a street railway contractor, engaged in business at Chicago; but his examination of the plant was cursory, being made within three days, and could not give the detailed information upon which a just estimate for this inquiry must be based, and it is conceded that he left out of consideration many important items (aside from the error in mileage) which should enter in and would greatly increase the amount as estimated on his basis. Both upon its face and by reference to other source of information, this estimate is far below any fair valuation, for the purpose in view, either at the sum stated by the witness, or with the additions conceded on behalf of the defendant; the former amount being in fact $320,000 short of the actual cash expenditures by the company for construction and equipment. Opposed to this, the estimate for complainant is made by Mr. Clark, an expert of distinction in this line, who gave weeks to the examination, with the aid of a corps of assistants, and presents the results in detailed statements, so that his testimony and estimates impress me as well founded; and they are supplemented and supported by the testimony of Mr. Coffin, Mr.

Payne, and other witnesses, and by comparative showing of mileage valuations in Massachusetts, which appear in the noteworthy system of reports published by that State. I am satisfied that the property of complainant represents a value, based solely upon the cost of reproduction, exceeding $5,000,000. And I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which were indispensable to the contemplated improvement, but of which a large part was of such nature that it does not count in the final inventory. No allowance enters in for the large investment arising out of the then comparatively new state of the art of electric railways for a large system, having reference to electrical equipment, weight of rails, character of cars, and the like, of which striking instanee appears in the fact that the electric motor which then cost about $2,500 can now be obtained for $800; so that work of this class was in the experimental stage in many respects, and the expenditures by the pioneer in the undertaking may not fairly be gauged by the present cost of reproduction. Of the $5,000,000 and over paid for the acquisition of the old lines, it would be difficult, if not impossible, from the testimony, to arrive at any fair approximation of the share or amount of tangible property which enters into the valuation in this inventory. It does appear that the roadways required reconstruction with new rails and paving, and that the amount stated was actually paid by the investors, making their investment nearly $9,000,000. How much of this may be defined or apportioned as the amount which was both "really and necessarily invested in the enterprise" (*vide* Road Co. *v.* Sandford, *supra*) I have not attempted to ascertain, except to this extent: that I am clearly of opinion that at least $2,000,000 of those preliminary expenditures are entitled to equitable consideration, as so invested, beyond the reproduction value, if the valuation of the investment is not otherwise found sufficient for all the purposes of this case, but no opinion is expressed in referenee to the remaining $1,885,644.

Third. The final inquiry, whether the net earnings shown are in excess of or equal to a just return upon the investment, presents no serious difficulty, under the premises above stated. Assuming $5,000,000 as the basis of investment, the ratio of earnings would be as follows: (1) At the extreme computations of defendant, the yearly average would be $364,000, which would yield .072 per cent; (2) at the complainant's figures, after adding the corrections for taxes, the return would be .033 per cent; (3) at the amounts which are above stated as my deductions from the testimony, the yearly average, being $228,333, would make .045 per cent. Assuming $7,000,000 as the basis, the ratio of earnings would be, upon each of said versions, as follows: For the first, .052 per cent; for the second, .023 per cent; for the third, .032 per cent.

The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is 6 per cent for real estate mortgages and like securities. If the $5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of $7,000,000, which is more logical and just, the 5 per cent named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent above that, with the large margin for depreciation left out of account.

I am of opinion that the testimony is not only convincing in support of the material allegations of the bill, but is uncontradicted and conclusive that the improved service received by the public, with the universal system of transfers, is well worth the five-cent rate charged therefor; that the company has not received earnings in excess of an equitable allowance to the investors for the means necessarily invested in furnishing such service; that enforcement of the ordinance would deprive complainant of property rights, by preventing reasonable compensation for its service; and that, therefore, the ordinance clearly violates the Constitution of the United States, and is invalid. Decree must enter accordingly, and for an injunction as prayed in the bill.

METROPOLITAN TRUST CO. *v.* HOUSTON AND TEXAS CENTRAL RAILROAD CO.

CIRCUIT COURT OF UNITED STATES, 1898.

[90 *Fed. Rep.* 683.[1]]

MCCORMICK, Circuit Judge. . . . The Houston and Texas Central Railroad Company, the successor to the Houston and Texas Central Railway Company, has a mortgage indebtedness equal to about $34,000 to the mile of its main line, and has stock outstanding to the amount of $10,000,000, making its stock and bonds equal to the sum of about $53,000 to the mile of its main line. The bill in this case avers that the defendant company and its predecessor company have necessarily expended in cash in the construction and equipment and betterment of the lines of the defendant company about $62,000 per mile of its said railways; that the lines of railway of the defendant company have at all times been operated as economically as practicable; that its operating expenses have at all times been as reasonable

[1] This case is abridged—ED.

and low in amount as they could be made by economy and judicious management; that the company has at all times secured the services of its officers and employees as cheaply as practicable, and has employed no more than was necessary, and at fair and reasonable rates of pay; that it has at all times secured all supplies, material, and property of every character used in the operation of its railways at the cheapest market price, and at rates as low as the same could be secured, and has secured and used no more than was actually necessary for the operation of its railways. Substantially the same allegation is made in the cross bill, and both are affirmed and sustained by affidavits of competent witnesses offered on the hearing of this motion. The valuation placed upon the property of this railroad corporation by the railroad commission of Texas is, in round numbers, $21,000 per mile. This statement shows the vast difference between the estimates made by and on behalf of the railroad company and the estimates made by the railroad commission of the value of the railroad's property on which it is entitled to earn some profit. It seems to be clear from the answer of the commission, the tone of the affidavits which it offers in support of its answer, and the argument of the attorney-general and the assistant attorney-general who represented it on this hearing, that in estimating the value of this railroad property no allowance was made for the favorable location of the same, in view of the advance in prosperity of the country through which it runs, and the increment to its value due to the settling, seasoning, and permanent establishment of the railways, and to the established business and the good will connected with its business, which has been established through a long series of years, and all of which ought reasonably to be considered in fixing the value of the property and the capitalization upon which, at least, it is entitled to earn, and should pay, some returns by the way of interest or dividends. This is practically the oldest railroad in the State. A few miles of another road were built earlier, but this road, running throughout the whole course of its main line through what is now the most populous and best developed portions of the State, and still rapidly increasing in population and development, has established a business that would not and could not be disregarded in estimating the value of the railroad, if considered solely as a business property and venture. It cannot be so considered, because of its quasi-public nature. Its duties, its obligations, and its liability to control are elements that must be considered. As popularly expressed, the rights of the people — the rights of shippers who use it as a carrier — have to be regarded; but, as judicially expressed, these last have to be so regarded as not to disregard the inherent and reasonable rights of the projectors, proprietors, and operators of these carriers. It is settled that a State has the right, within the limitation of the constitution, to regulate fares. From the earliest times public carriers have been subject to similar regulations through general law administered by the courts, requiring that the rates for carriage should be reasonable,

having regard to the cost to the carrier of the service, the value of the service to the shipper, and the rate at which such carriage is performed by other like carriers of similar commodities under substantially similar conditions. But neither at common law nor under the railroad commission law of Texas can the courts or the commission compel the carriers to submit to such a system of rates and charges as will so reduce the earnings below what reasonable rates would produce as to destroy the property of the carrier, or appropriate it to the benefit of the public. The cost of the service in carrying any one particular shipment may be difficult to determine, but the cost to the carrier of receiving, transporting, and delivering the whole volume of tonnage and number of passengers in a given period of time must include, as one of its substantial elements, interest on the value of the property used in the service. In countries conditioned as Texas has been and is, such a railroad property and business cannot be reproduced, except substantially in the same manner in which this has been produced; that is, by a judicious selection of location, by small beginnings, and gradual advance through a number of years, more or less, of unproductive growth. The particular location of this road, of course, cannot be reproduced, and it cannot be appropriated by another private or quasi-public corporation carrier by the exercise of the State's power of eminent domain. And, even if the State should proceed to expropriate this property for the purpose of taking the same to itself for public use, the location of this road cannot be appropriated, any more than any other property right of a natural person or of a corporation can be appropriated, without just compensation. It is therefore not only impracticable, but impossible to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provision of the Fourteenth Amendment to the Constitution of the United States, which forbids that a State shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. It is true that railroad property may be so improvidently located, or so improvidently constructed and operated, that reasonable rates for carriage of freights and passengers will not produce any profit on the investment. It is also true that many railroads not improvidently located, and not improvidently constructed, and not improvidently operated may not be able, while charging reasonable rates for carriage of freight, to earn even the necessary running expenses, including necessary repairs and replacements. And there are others, or may be others, thus constructed and conducted, which, while able to earn operating expenses, are not able to earn any appreciable amount of interest or dividends for a considerable time

after the opening of their roads for business. This is true now of some of the roads, parties to these bills. At one time or another, and for longer or shorter times, it has been true, doubtless, of each of the roads that are parties to these bills. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitations of the various communities through which they run, and by various encouragements offered by the State. The commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the "period of construction" mentioned is probably limited to the time when each section of the road was opened to the public for business. And even if extended to the time when the road was completed to Denison and to Austin in 1873, nearly twenty years after its construction was begun at Houston, it would not cover all of the time, and possibly not nearly all of the time, in which the railroad company and its predecessors have lost interest on the investment. The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists to-day, may not be exactly accurate,— clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist to-day as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the service is rendered, cannot be reduced by the force of State law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensation to the owners thereof, and would deprive the owners thereof of the equal protection of the law guaranteed by the Constitution of the United States, as cited.

It seems to be contended that the case of the Houston and Texas Central Railroad Company fully justifies the action of the commission in its imposition of a system of rates, because, as it urged, it has made earnings over and above operating expenses sufficient to pay the interest on its outstanding bonds, and has a small surplus of a few thousand dollars in excess, as shown by its return to the commission of the operations of the year ending the 30th of June, 1898; in other words, it has paid interest on $34,000 of bonds to the mile. The return referred to is made on forms submitted by the commission, and under the item of "operating expenses" only ordinary repairs and replacements are allowed. In case an insufficient wooden bridge is replaced by an adequate iron bridge, that is treated as a betterment, and not permitted to figure in the returns as a part of the operating expenses. The bill and cross bill show that, if such betterments, which can only be made or procured out of the earnings of the road, were allowed in the return of operating expenses, the revenue earned

and rendered as net revenue would not have been equal, by several hundred thousand dollars, to the interest on the bonded indebtedness; that the bonded indebtedness outstanding against this road being in excess of the value fixed by the commission, to the extent of more than 50 per cent, the company has no means of providing for such betterments, if not at all allowed to charge them at any time against the gross earnings of the road. More than this, it is shown that the road has never at any time paid any dividend upon its stock. On the whole case, as made in the case of the Houston and Texas Central Railroad Company, it seems clear to me that the system of rates adopted and enforced by the commission does not afford to the owners of this property the equal protection of the law, and takes from the owners and stockholders the property they have therein, without just compensation, and that, therefore, the rates must be held to be unreasonably low, unjust, and confiscatory, and should not be submitted to, and cannot be suffered to be enforced. As already said, the case made for relief in each of the other suits seems to be stronger than the case of the Houston and Texas Central Railroad Company; and the evidence appears to me to show clearly that the system of rates imposed is, as to each of the roads, unreasonably low, unjust, and confiscatory. Therefore the prayer of the bill in each case is granted, to the extent of enjoining the roads from adopting the rates heretofore promulgated by the commission, and enjoining the commission and the attorney-general from enforcing the same, and enjoining all persons claiming thereunder from prosecuting the railroads, or any of the officers thereof, for the non-observance of the system of rates heretofore promulgated by the commission.

SMYTH *v.* AMES.

SUPREME COURT OF THE UNITED STATES, 1898.

[169 *U. S.* 466.[1]]

EACH of these suits was brought July 28, 1893, and involves the constitutionality of an Act of the Legislature of Nebraska, approved by the Governor April 12, 1893, and which took effect August 1, 1893. It was an Act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska and to provide penalties for the violation of this Act." Acts of Nebraska, 1893, c. 24; Compiled Statutes of Nebraska, 1893, c. 72, Art. 12. The act is referred to in the record as House Roll 33.

[1] This case is abridged. — ED.

These cases were heard at the same time, and in the one in which the Union Pacific Company, the St. Joseph Company, the Omaha Company, and the Kansas City Company were defendants, it was adjudged in the Circuit Court — Mr. Justice BREWER presiding — as follows: "That the said railroad companies and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any or either of them for the transportation of freight on and over their respective roads in this State from one point to another therein, whereby such rate shall be reduced to those prescribed by the Act of the Legislature of this State, called in the bill filed therein, 'House Roll 33,' and entitled 'An Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this Act,' approved April 12, 1893, and below those now charged by said companies or either of them or their receivers, or in anywise obeying, observing, or conforming to the provisions, commands, injunctions, and prohibitions of said alleged act; and that the Board of Transportation of said State and the members and secretaries of said Board be in like manner perpetually enjoined and restrained from entertaining, hearing, or determining any complaint to it against said railroad companies or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants, or employees, done, suffered, or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered, or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the attorney-general of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, *mandamus*, civil action, or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof, directed to the said defendants, commanding, enjoining, and restraining them as hereinbefore set forth, which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad companies may not exact for the transportation of freight from one point to another within this State, charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged, and decreed that the defend-

ants, members of the Board of Transportation of said State, may hereafter when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It is further ordered, adjudged, and decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The above decree was in accordance with the prayer for relief. A similar decree was rendered in each of the other cases.

The present appeals were prosecuted by the defendants constituting the State Board of Transportation, as well as by the defendants who are Secretaries of that Board.

Mr. Justice HARLAN. . . . It is said by the appellants that the local rates established by the Nebraska statute are much higher than in the State of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the Circuit Court: "It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining States, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are forty per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater that in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance." 64 Fed. Rep. 165. In these views we concur, and it is unnecessary to add anything to what was said by the Circuit Court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court

should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the Legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business. . . .

In our opinion, the broad proposition advanced by counsel involves misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration

the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. Olcott *v.* The Supervisors, 16 Wall. 678, 694; Sinking Fund Cases, 99 U. S. 700, 719; Cherokee Nation *v.* Southern Kansas Railway, 135 U. S. 641, 657. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in Covington & Lexington Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 596, 597, is pertinent to the question under consideration. It was there observed: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the Legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The Legislature has the authority, in every case, where its power has not been restrained by contract,

to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the Legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway

under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

Perceiving no error on the record in the light of the facts presented to the Circuit Court,

The decree in each case must be affirmed.[1]

[1] *Compare* Water Works *v.* Schottler, 110 U. S. 347; Railroad Commission Cases, 116 U. S. 307; R. R. *v.* Illinois, 118 U. S. 557; R. R. *v.* Minn., 134 U. S. 418; Reagan *v.* Trust Co., 154 U. S. 362; R. R. *v.* Gill, 156 U. S. 649; Turnpike *v.* Sandford, 164 U. S. 578; Land Co. *v.* City, 174 U. S. 739. — Ed.

MINNEAPOLIS *v.* ST. LOUIS RAILROAD COMPANY.

SUPREME COURT OF THE UNITED STATES, 1902.

[186 *U. S.* 257.[1]]

MR. JUSTICE BROWN. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the Commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low. The charges for the carriage of freight of different kinds are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size and value of the packages and the cost of handling them. Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In Smyth *v.* Ames, 169 U. S. 466, we expressed the opinion (page 541) that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by section 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular. As we said in Smyth *v.* Ames, (page 547), "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." The very fact that the commission, while fixing the rate to Boyd at $2.48, within two cents of the amount there-

[1] Only an extract is printed. — ED.

tofore charged by the companies themselves, gradually reduced that rate in proportion to the mileage, to Norwood, where it was fixed at $1.57, while the company charged an arbitrary rate of $2.50 to Norwood, and to all the stations between Norwood and Boyd, tends, at least, to show that the rates were fixed upon a more reasonable principle than that applied by the companies.

OZARK-BELL TELEPHONE COMPANY *v.* SPRINGFIELD.

CIRCUIT COURT OF THE UNITED STATES, 1905.

[140 *Fed.* 666.[1]]

IN Equity. On demurrer to bill.

MARSHALL, D. J. 3. It is not necessary that the complainant should state any facts to show that the rates fixed by it are reasonable. The court is not called on to express any opinion as to those rates. It is sufficient if the facts that show the ordinance rates to be unreasonable are pleaded, and those facts I think appear with sufficient certainty. The complainant was not called on to allege the cost of the service rendered to any particular subscriber. From the nature of the business, cost to the complainant was in furnishing facilities for the use of its group of subscribers, and that cost could not be estimated by the frequency with which any special subscriber availed himself of the facilities extended. The only way the question of cost and compensation could be presented was by aggregates, and that the complainant has done. The injury to the complainant resulting from an enforcement of the ordinance rates is sufficiently shown by the averments that they are less than the rates theretofore enforced, and will not yield a sufficient sum to pay the cost of operation and maintenance; the sum yielded by the original rates being barely sufficient for that purpose.

The demurrer must be overruled, and as the bill is sworn to positively, and the only opposition to the injunction sought is by the way of demurrer, the temporary injunction will issue.

[1] Only one point is printed. — ED.

KENNEBEC WATER COMPANY *v.* WATERVILLE.

SUPREME COURT OF MAINE, 1904.

[95 *Me.* 185.[1]]

INSTRUCTIONS to appraisers given.

SAVAGE, J. The basis of all calculation as to the reasonableness of rates to be charged by a public service corporation is the fair value of the property used by it for the convenience of the public. At the same time, the public have the right to demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. Summarized, these elemental principles are the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation and current operating expenses, and the right of the public to have no more exacted than the services in themselves are worth. The reasonableness of the rate may also be affected for a time by the degree of hazard to which the original enterprise was naturally subjected; that is, such hazard only as may have been justly contemplated by those who made the original investment, but not unforeseen or emergent risks. And such allowance may be made as is demanded by an ample and fair public policy. If allowance be sought on account of this element, it would be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this hazard. In determining the present value of the company's plant, the actual construction cost thereof, with proper allowances for depreciation, is legal and competent evidence, but it is not conclusive or controlling. The request that "under no circumstances can the value of the plant be held to exceed the cost of producing at the present time a plant of equal capacity and modern design" should not be given. Among other things, it leaves out of account the fact that it is the plant of a going concern, and seeks to substitute one of the elements of value for the measure of value itself.

[1] Only one of the many points made in this notable opinion is printed. — ED.

PENNSYLVANIA RAILROAD COMPANY *v.* PHILADELPHIA COUNTY.

SUPREME COURT OF PENNSYLVANIA, 1908.

[220 *Pa. St.* 100.[1]]

BILL in equity for an injunction to restrain the county of Philadelphia from the collection of any penalty imposed by the act of April 5, 1907, for failure to comply with its provisions by charging passengers upon certain lines in excess of the fares therein provided.

Opinion by Mr. Chief Justice MITCHELL, January 20, 1908.

Another objection to the method pursued in the investigation of this subject is that the court confined the inquiry to the passenger traffic instead of taking into consideration the entire traffic of every kind as appellant claims should be done. This is the most urgently pressed of the appellant's points, but it does not carry conviction. It would be sufficient answer to say that the legislature itself in the act of 1907 has treated the passenger traffic as a separate and independent subject of examination and regulation. If the legislature may do that in ascertaining whether the charter franchise is injurious to the citizens of the commonwealth why may not the courts do the same in ascertaining whether injustice has been done to the corporators? Both are elements to be considered, and both are powers exercised under the same section of the constitution. But independently of this, true business principles require that the passenger and freight traffic not only may, but should be separately considered. The intelligent business of the world is done in that way. Every merchant and manufacturer examines and ascertains the unprofitable branches of his business with a view to reducing or cutting them off entirely, and there is no reason why a railroad or other corporation should not be permitted to do the same thing as long as its substantial corporate duties under its franchise are performed. While the public has certain rights which in the case of conflict must prevail, yet it must not be forgotten that even so-called public service corporations are private property organized and conducted for private corporate profit. And unless necessary for the fulfillment of their corporate duties they should not be required to do any part of their business in an unbusinesslike way with a resulting loss. If part is unprofitable it is neither good business nor justice to make it more so because the loss can be offset by profit on the rest. To concede that principle would, as the court below indicated, permit the legislature to compel the carriage of passengers practically for nothing though the inexorable result would be that freight must pay inequitable rates that passenger travel may be cheap. The

[1] Only one opinion is printed. — ED.

corporation is entitled to make a fair profit on every branch of its business subject to the limitation that its corporate duty must be performed even though at a loss. What is a fair profit is, as already said, a highly complicated and difficult question. The learned court below availed themselves of all the best evidence that was offered or shown to be attainable, considered it with exemplary patience and care, and their conclusion that the enforcement of the act of 1907 against the complainant would do injustice to the corporators is beyond just criticism.

Decree affirmed.

KNOXVILLE *v.* KNOXVILLE WATER COMPANY.

SUPREME COURT OF THE UNITED STATES, 1909.

[212 *U. S.* 1.]

THE facts, which involve the constitutional validity of an ordinance of the city of Knoxville fixing maximum rates to be charged for water by the defendant water company, are stated in the opinion.

MR. JUSTICE MOODY. We are also of opinion that the master and the court erroneously excluded evidence which had an important bearing upon the true earning capacity of the company under the ordinance. A clear appreciation of this error can be best obtained by a comprehensive review of the hearing. The company's original case was based upon an elaborate analysis of the cost of construction. To arrive at the present value of the plant large deductions were made on account of the depreciation. This depreciation was divided into complete depreciation and incomplete depreciation. The complete depreciation represented that part of the original plant which through destruction or obsolescence had actually perished as useful property. The incomplete depreciation represented the impairment in value of the parts of the plant which remained in existence and were continued in use. It was urgently contended that in fixing upon the value of the plant upon which the company was entitled to earn a reasonable return the amounts of complete and incomplete depreciation should be added to the present value of the surviving parts. The court refused to approve this method, and we think properly refused. A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make

such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization — a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past.[1]

[1] Only one point is printed. — Ed.

CHAPTER VIII.

PROHIBITION OF UNJUST DISCRIMINATION.

FITCHBURG RAILROAD *v.* GAGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1859.

[12 *Gray*, 393.]

ACTION of contract upon an account annexed against Gage, Hittinger & Company for the transportation of ice from Fresh and Spy Ponds to Charlestown, over that portion of the plaintiff's railroad which was formerly the Charlestown Branch Railroad, and from Groton to Charlestown over that portion which has always been known as the Fitchburg Railroad. The case was referred to an auditor, to whose

report the defendants took exceptions presenting pure questions of law, and was thereupon reserved by *Bigelow*, J., for the consideration of the whole court, and is stated in the opinion.

S. Bartlett & D. Thaxter, for the defendants.

R. Choate & H. C. Hutchins, for the plaintiffs.

MERRICK, J. This action is brought to recover the balance of the account annexed to the writ. The defendants admit the transportation for them of all the ice charged to them in the account, and that the several items contained in it relative to the service performed for them are correct. But they insist that the rate of compensation claimed is too large, and that the charges ought to be reduced. They have also filed an account in set-off, claiming to recover back the amount of an alleged overpayment made by them for similar services in the transportation of other quantities of ice belonging to them.

Their claim to be entitled to a diminution in the amount of charges in the plaintiffs' account, and to a recovery of the sum stated in their account in set-off, both rest upon the same ground. They contended and offered to prove at the hearing before the auditor, that while the plaintiffs were transporting the ice they were at the same time hauling over the same portion of their road various quantities of bricks for other parties; that ice and bricks were of the same class of freight, and that ice was as low a class of freight as bricks in regard to the risk and hazard of transportation; and that while they charged the defendants fifty cents per ton for the transportation of ice, they charged other parties only twenty cents per ton for a like service in reference to bricks.

The defendants contended that they were entitled to maintain their claim upon two grounds: first, under the provisions in the plaintiffs' act of incorporation; and, secondly, upon the general principle that as common carriers they were bound and required to transport every species of freight of the same class for any and all parties at the same rate of compensation; and that they had therefore no right to charge any greater sum for the transportation of ice than that for which they had actually carried bricks for other parties. Neither of the claims was sustained by the auditor, and he accordingly rejected the evidence offered in support of them. In both particulars we think his ruling was correct.[1]

It is contended on behalf of the defendants that the plaintiffs were common carriers; and that by the principles of the common law they are in that relation required to carry merchandise and other goods or chattels of the same class at equal rates for the public and for each individual on whose account service in this line of business is performed. There is no doubt they are common carriers. That is fully established. Thomas *v.* Boston & Providence Railroad, 10 Met. 472. Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263. But by the law of this Commonwealth every railroad corporation is authorized to establish for their sole benefit a toll upon all passengers and property conveyed or transported on their railroad, at such rates as may be de-

[1] The decision upon the first ground is omitted. — ED.

termined by the directors. Rev. Sts. c. 39, § 83. This right however is very fully, and reasonably, subjected to legislative supervision and control; a provision which may be believed to be sufficient to guard this large conceded power against all injustice or abuse. And in view of this large and unqualified, and therefore adequate supervision, the right of railroad corporations to exact compensation for services rendered may be considered as conforming substantially to the rule of the common law upon the same subject. This rule is clearly stated by Lawrence, J., in the case of Harris *v.* Packwood, 3 Taunt. 272: "I would not, however, have it understood that carriers are at liberty by law to charge whatever they please; a carrier is liable by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage; and not to extort what he will." This is the doctrine of the common law. 2 Kent Com. (6th ed.) 599. Angell on Carriers, § 124. And it supplies substantially the same rule which is recognized and established in this Commonwealth by the provisions of St. 1845, c. 191. The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon those subjects. The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could of course make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly then the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known and cannot therefore be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services, to other parties.

There remains another question, the determination of which depends upon other and different considerations. The auditor, for the purpose of presenting the question to the determination of the court, rejected evidence offered by the defendants tending to prove that prior to the 22d of February, 1855, and down to that time, the plaintiffs had transported for them large quantities of ice from Groton at a much less rate of compensation than the amount charged in their account under date of the 31st January of that year, without having given them notice, and without their knowledge, of any intention to increase the charge for such service. This evidence was rejected, for the reason that the directors of the plaintiff corporation had, prior to the transportation of the ice in the last named item, fixed and raised the rate of transportation of ice on their road from Groton to ninety cents per ton. This evidence ought to have been received. In the absence of any special contract between the parties, it had a tendency to show what was the understanding between the parties on the subject, and what the defendants had a right to consider would be the price to be charged to them for services performed in their behalf. If not controlled, it would and ought to have had a material effect upon determining the question concerning the compensation which the plaintiffs were entitled to recover. It might have been controlled either by showing that the defendants did in fact have notice of the new rate of charge established by the directors of the company, or that the notice was communicated generally to all persons, in the usual and ordinary manner, and with such degree of publicity that all persons dealing with them might fairly be presumed to have cognizance of the change.

In this particular therefore the exception to the ruling of the auditor must be sustained; in all others, the exceptions taken to his decisions are overruled.

The case must therefore be recommitted to the auditor for the purpose of hearing the evidence rejected, and any other proofs which the parties may respectively produce relative to the items of charge under date of January 31st, and finding the amount which is due for the services there stated; but for no other purpose whatever.

Exceptions sustained.

MESSENGER *v.* PENNSYLVANIA RAILROAD COMPANY.

SUPREME COURT OF NEW JERSEY, 1873.
COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1874.

[7 *Vroom* (36 N. J. L.), 407, 8 *Vroom* (37 N. J. L.), 531]

BEASLEY, C. J. The Pennsylvania Railroad Company, who are the defendants in this action, agreed with the plaintiffs to carry certain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation is, that goods have been carried for other parties at a certain

rate below what the goods of the plaintiffs have been carried, and this suit is to enforce the foregoing stipulation. The question is, whether the agreement thus forming the foundation of the suit is legal.

There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers, and it is equally clear that, if the power to make the present engagement exists, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious, that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preferences can be made. A railroad is not, in general, subject to much competition in the business between its termini; the difficulty in getting a charter, and the immense expense in building and equipping a road, leaves it, in the main, without a rival in the field of its operation; and the consequence is, the trader who can transmit his merchandise over it on terms more favorable than others can obtain is in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare, which is materially dependent on commercial competition and the absence of monopolies. Consequently, the inquiry is of moment, whether such compacts may be made. I have examined the cases, and none that I have seen is, in all respects, in point, so that the problem is to be solved by a recurrence to the general principles of the law.

The defendants are common carriers, and it is contended that bailees of that character cannot give a preference in the exercise of their calling to one dealer over another. It cannot be denied, that at the common law, every person, under identical conditions, had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. Nothing can be clearer than that, under the prevalence of this principle, a common carrier could not agree to carry one man's goods in preference to those of another.

It is important to remark, that this obligation of this class of bailees is always said to arise out of the character of the business. Sir William Jones, importing the expression from the older reports, declares that this, as well as the other peculiar responsibilities of the common carrier, is founded in the consideration that the calling is a public employment. Indeed, the compulsion to serve all that apply could be justified in no other way, as the right to accept or reject an offer of business is necessarily incident to all private traffic.

Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy which, in his own despite, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rules that the carrier shall receive all the goods tendered loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable; a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants.

From these considerations, it seems to me, that testing the duties of this class of bailees by the standard of the ancient principles of the law, the agreement now under examination cannot be sanctioned. This is the sense in which Mr. Smith understands the common law rule. In his Leading Cases, p. 174, speaking of the liabilities of carriers, he says: "The hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another, for the same service." I am aware, that in the case of Baxendale *v.* The Eastern Counties Railway, 4 C. B. (N. S.) 81, this definition of the common law rule was criticised by one of the judges, but the subject was not important in that case, and was not discussed, and the expression of opinion with respect to it was entirely cursory. Indeed, the whole question has become of no moment in the

English law, as the subject is specifically regulated by the statute 17 and 18 Vict., ch. 31, which prohibits the giving "of any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." The date of this act is 1854, and since that time the decisions of the courts of Westminster have, when discussing this class of the responsibilities of common carriers, been devoted to its exposition. But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. This was so held in the case of Sandford *v.* The Catawissa, Williamsport, & Erie Railroad Co., 24 Penn. 378, in which an agreement by a railway company to give an express company the exclusive right to carry goods in certain trains was pronounced to be illegal. In a more recent decision, Mr. Justice Strong refers to this case with approval, and says that the special provisions which are sometimes inserted in railroad charters, in restraint of undue preferences, are "but declaratory of what the common law now is." This is the view which, for the reasons already given, I deem correct.

But even if this result could not be reached by fair induction from the ancient principles which regulate the relationship between this class of bailees and their employers, I should still be of opinion that we would be necessarily led to it by another consideration.

I have insisted that a common carrier was to be regarded, to some extent at least, as clothed with a public capacity, and I now maintain, that even if this theory should be rejected, and thrown out of the argument, still the defendants must be considered as invested with that attribute. In my opinion, a railroad company, constituted under statutory authority, is not only, by force of its inherent nature, a common carrier, as was held in the case of Palmer *v.* Grand Junction Railway, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended, that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede, that when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. I think they are, unalterably, parts of the supreme authority, and in whatsoever hands they may be found,

they must be considered as such. In the use of such franchises, all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants, that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality. On these grounds, the contract now in suit must be deemed illegal in the very particular on which a recovery is sought.

The result is, the defendants must have judgment on the demurrer.

In the Court of Errors and Appeals, on error to the Supreme Court, the opinion of the Court was delivered by

BEDLE, J.[1] The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means established and intended for the public good, to promote un-

[1] Part of the opinion is omitted. — ED.

fair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted. . . .

It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interest of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade. This contract being clearly within it, and odious to the law in the respect on which a recovery is sought, cannot be sustained. But there is an additional ground upon which it is also objectionable. I entirely agree with the Chief Justice, that, in the grant of a franchise of building and using a public railway, that there is an implied condition that it is held as a *quasi* public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and, in the nature of their business, are subject to and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are intrusted with certain functions of the government, in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it.

Every trust should be administered so as to afford to the *cestui que trust* the enjoyment of the use intended, and these railroad trustees must be held, in their relation to the public, to such a course of dealing as will insure to every member of the community the equal enjoyment of the means of transportation provided, subject, of course, to their reasonable ability to perform the trust. In no other way can trade and commercial interchange be left free from unjust interference. On this latter ground, that part of the contract in question is illegal.

The judgment of the Supreme Court must be affirmed.

SILKMAN *v.* WATER COMMISSIONERS.

COURT OF APPEALS, NEW YORK, 1897.

[152 *N. Y.* 327.[1]]

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered August 3, 1893, which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint upon the merits on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

MARTIN, J. . . . The claim of the plaintiff, that the rents established by the defendant were not authorized by the act incorporating it, cannot be sustained. In broad terms, the act conferred upon the defendant the power to establish a scale of rents to be charged and paid for the use and supply of water, having reference to matters referred to in the statute, among which was the consumption of water. The objection made here is that the persons who consumed large quantities of water were not charged as much per hundred cubic feet as those who consumed a less amount. Under this statute the question of consumption was one of the elements to be considered in determining the rates. Surely, it cannot be said to be unreasonable to provide less rates where a large amount of water is used than where a small quantity is consumed. That principle is usually present in all contracts or established rents of that character. It will be found in contracts and charges relating to electric lights, gas, private water companies, and the like, and is a business principle of general application. We find in the rates as they were established nothing unreasonable, or that would in any way justify a court interfering with them.

It follows that the decisions of the courts below were correct, and should be affirmed.

The judgment should be affirmed, with costs.

All concur. *Judgment affirmed.*

[1] This case is abridged. — ED.

WESTERN UNION TELEGRAPH COMPANY *v.* CALL PUBLISHING COMPANY.

SUPREME COURT OF THE UNITED STATES, 1901.

[181 *U. S.* 92.[1]]

THIS was an action commenced on April 29, 1891, in the district court of Lancaster County, Nebraska, by the Call Publishing Company to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error, for telegraphic services rendered. According to the petition the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called The Lincoln Daily Call. The Nebraska State Journal was another newspaper published at the same time in the same city, by the State Journal Company. Each of these papers received Associated Press dispatches over the lines of defendant. The petition alleged: "4th. That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that while the defendant demanded, charged and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such dispatches amounting to 1500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month it charged and collected from the said State Journal Company for the same, like and contemporaneous services only the sum of $1.50 per 100 words daily per month.

MR. JUSTICE BREWER. The case, therefore, was not submitted to the jury upon the alleged efficacy of the Nebraska statute in respect to discriminations, but upon the propositions distinctly stated, that where there is dissimilarity in the services rendered a difference in charges is proper, and that no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and that the recovery must be limited to the amount of the unreasonable discrimination.

No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines.

[1] Only an extract is printed. — ED.

But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.[1]

GOODRIDGE *v.* UNION PACIFIC RAILWAY COMPANY.

CIRCUIT COURT OF THE UNITED STATES, 1889.

[37 *Fed.* 182.[2]]

AT law, on demurrer to answer.

HALLETT, J. From all this it is apparent that the answer sets up certain considerations received by the defendant from the Marshall Company, upon which less rates are given to the latter than to other shippers. And these considerations are not in the way of a charge for carrying coal upon which any estimate can be made to ascertain the amount of such charge. Whether we refer to the claim for damages against the Denver & Western Company, or to the matter of furnishing coal for defendant's use, or to any other consideration for the contract, it is plain that there is no basis of calculation other than the rate fixed in the contract itself. It is not possible to say how much, if anything, should be added to the contract price of carrying coal on account of the claim for damages against the Denver & Western Company, or on account of canceling the contract with the Union Coal Company, or on account of furnishing coal at cost for defendant's use, or on account of furnishing coal for sale, at a reduced price, or on account of any other matter mentioned in the answer. The whole answer amounts only to this: that the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant. And it is obvious that this is no answer to a complaint of unlawful discrimination.

[1] *Compare:* Schofield *v.* Lake Shore & M. S. Ry. Co., 43 Oh. St. 571, *accord.*; and Concord & P. R. R. Co. *v.* Forsaith, 59 N. H. 122, *contra.*

[2] Only an extract is printed. — ED.

318½ TONS OF COAL.

DISTRICT COURT OF THE UNITED STATES (CONN.), 1877.
CIRCUIT COURT OF THE UNITED STATES, 1878.

[14 *Blatch.* 453.]

LIBEL *in rem* for freight and demurrage.

The libellants carried a cargo of coal to New Haven, to be delivered to the Glasgow Co. at the Canal Railroad Dock. The consignee was located near the line of the railroad in Massachusetts. It was the custom of the port for coal, thus consigned to a railroad wharf, to be shovelled from the hold of the vessel into large buckets, let down and hauled up by a steam derrick, which discharged them into the cars of the railroad. Prior to 1871, the shovellers who filled the buckets had been hired and paid by the master of the vessel. In that year the Canal Railroad Co. made a rule that it would thereafter supply all coal vessels with shovellers, at ten cents a ton, and that no vessel could discharge except by using shovellers thus supplied. Ten cents a ton was then the ordinary rate of wages for such services, but in 1876 charges of shovellers fell, and they could be hired for eight cents. The libellants thereupon hired shovellers at eight cents, and refused to receive those furnished by the company, unless they would work at the same rate. The company for this cause refused to allow the cargo to be unloaded, and it was discharged at a neighboring wharf, after some delay, and there libelled.

SHIPMAN, J. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the person entitled to receive the coal, at the usual and reasonable time and place, and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event, the contract of affreightment was complied with by the libellants, and freight was earned. No question was made as to the liability of the defendants under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the Canal Dock. It is admitted that the company, upon notification that the coal was ready to be discharged,

replied that said cargo might be forthwith discharged, and would be received by it for the defendants.

The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used; (Croucher *v.* Wilder, 98 Mass. 322;) but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported, in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company, as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. . . . As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and, if they refuse, without some just ground, they are liable to an action." (2 Kent's Comm. 599.) A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation. (Crouch *v.* L. & N. W. Railway Co., 14 C. B. 255.) The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries "for all people indifferently." But, while admitting this duty, the company has declared that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shovelling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, You shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable

times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is the duty of the carrier, for which he is responsible, and should be in his own control. (Beadell *v.* Eastern Counties R. Co., 2 C. B. N. S. 509.) It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners. The fact that the barge owners are using, for a compensation, the derricks and tubs of the railroad company, is not material. The berths under the derricks have been designated by the company, as proper places where coal is to be received, and, under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the places designated by the company for delivery, without the use of the railroad company's machinery.

It is true, that, under this rule, the delivery of coal into the cars of the railroad company has been more expeditiously performed, and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not, of itself, an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say, that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company; but, in the present condition of the coal traffic at the port of New Haven, this necessity does not exist. The power is a convenience to the railroad company. It is not a necessity for the transaction of business.

It is not necessary to consider the inconveniences which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule presupposes that the same price is to be charged by the employees furnished by the railroad company, which is generally paid by others for the same service. When prices are unvarying, no serious trouble results. There is no alternative, however, for the barge owners, but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and then have the question of rates deter-

mined by litigation. The result would be, that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment, they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor.

As matter of law, it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. "Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage." (Wordin *v.* Bemis, 32 Conn. 268.)

The libellants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less $19.55, the amount paid, to wit, the sum of $171.55, and for damages in the nature of demurrage, for a detention for six days, being $114.66.

The claimants appealed.

Simeon E. Baldwin and *William K. Townsend*, for the libellants.

Johnson T. Platt, for the claimants.

BLATCHFORD, J. The decision of this case in the District Court was placed upon the ground that the New Haven and Northampton Company, as a common carrier, had no right to impose on the canal-boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ, to place it there, shovellers designated by the company, and pay such shovellers the rate of compensation fixed by the company for such service. It is contended, in this court, by the claimants, that the District Court ignored the status of the company as a wharf owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact seven cents per ton for coal discharged at its wharf, as wharfage; that the libellants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company, in the way of derricks, hoisting engines, etc., is the use of the wharf; that all which the company did was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shovelled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company, as a wharf owner. The difficulty with this view of the case is, that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and, if any payment was to be made for the use of the wharf, by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptation of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., Canal Dock, New Haven," — the Glasgow Company being a mill owner at a place on the line of the railroad company, and

the latter company being the owner of the Canal Dock at New Haven, with its tracks running to and on the dock, and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the tracks, — the coal was delivered by the boat into the tubs, and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately for the hoisting. If the company had a right to charge the boat for tying up to, and using the spiles on, the wharf, no such charge was made. There was, therefore, no foundation for the requirement as to the shovellers, in any relation between the company as a wharf owner and the boat.

The imposition of the requirement by the claimants' agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the District Judge, in his decision in the court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable, it would have been reasonable. It might, indeed, have been reasonable without being necessary. But, to be reasonable, it mus be reasonable as respects both parties. In the present case, the effect of the requirement was to impose on the boat an unnecessary expense of two cents per ton of coal, for shovelling into the tubs.

There must be a decree for the libellants, in affirmance of the decree below, with costs.

HAYS *v.* THE PENNSYLVANIA COMPANY.

CIRCUIT COURT OF THE UNITED STATES, N. OHIO, 1882.

[12 *Fed.* 309.]

BAXTER, C. J. The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year, — the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defend-

ant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at $4,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is the question we are now called on to decide. If the instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight

carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person, may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of Nicholson *v.* G. W. R. Co., 4 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case that we have been able to find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the railroad of

£40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But *this case* calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty £40,000 worth of tonnage per year for 10 years to the railroad company, and to tender the same for shipment in fully loaded trains, at the rate of seven trains per week. It was in consideration of these obligations — which, in the judgment of the court, enabled the railroad company to perform the service at less expense — the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents;

or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.

WELKER, D. J., concurred.

MENACHO *v.* WARD.

CIRCUIT COURT OF THE UNITED STATES, S. NEW YORK, 1886.

[27 *Fed.* 529.]

WALLACE, J. The complainants have filed a bill in each of these causes to restrain the defendants from making discriminations for transportation against the complainants, which consist in charging them a higher rate of freight than is charged by defendants to other shippers of merchandise generally. A motion is now made for a preliminary injunction. The facts in each case are essentially the same, and both cases may be considered together.

The complainants are merchants domiciled in the city of New York, and engaged in commerce between that port and the island of Cuba. The defendants are proprietors or managers of steamship lines plying between New York and Cuba. Formerly the business of transportation between the two places was carried on by sailing vessels. In 1877 the line of steamships known as "Ward's Line" was established, and in 1881 was incorporated by the name of the New York & Cuba Mail Steamship Line under the general laws of the State of New York. At

the time of the incorporation of this company the line of steamships owned by the defendants Alexandre & Sons had also been established. These two lines were competitors between New York and Cuba, but for several years both lines have been operated under a traffic agreement between themselves, by which uniform rates are charged by each to the public for transportation. The two lines are the only lines engaged in the business of regular transportation between New York and Cuba; and unless merchants choose to avail themselves of the facilities offered by them, they are obliged to ship their merchandise by vessels or steamers which may casually ply between the two places.

It is alleged by the complainant that the defendants have announced generally to New York merchants engaged in Cuban trade that they must not patronize steamships which offer for a single voyage, and on various occasions when other steamships have attempted to procure cargoes from New York to Havana have notified shippers that those employing such steamships would thereafter be subjected to onerous discriminations by the defendants. The defendants allege in their answer to the bill, in effect, that it has been found necessary, for the purpose of securing sufficient patronage, to make differences in rates of freight between shippers in favor of those who will agree to patronize the defendants exclusively. Within a few months before the commencement of this suit two foreign steamers were sent to New York to take cargoes to Havana, and the complainants were requested to act as agents. Thereupon the complainants were notified by the defendants that they would be "placed upon the black-list" if they shipped goods by these steamers, and that their rates of freight would thereafter be advanced on all goods which they might have occasion to send by the defendants. Since that time the defendants have habitually charged the complainants greater rates of freight than those merchants who shipped exclusively by the defendants. The freight charges, by the course of business, are paid by consignees at the Cuban ports. The complainants have attempted to pay the freight in advance, but have found this course impracticable because their consignees are precluded from deducting damages or deficiencies upon the arrival of the goods from the charges for freight, and as a result some of the complainants' correspondents in Cuba refuse to continue business relations with them, being unwilling to submit to the annoyance of readjusting overcharges with complainants. Upon this state of facts the complainants have founded the allegation of their bill that the defendants "have arbitrarily refused them equal terms, facilities, and accommodations to those granted and allowed by the defendants to other shippers, and have arbitrarily exacted from them a much greater rate of freight than the defendants have at the same time charged to shippers of merchandise generally as a condition of receiving and transporting merchandise." They apply for an injunction upon the theory that their grievances cannot be redressed by an action at law.

It is contended for the complainants that a common carrier owes an

equal duty to every member of the community, and is not permitted to make unequal preferences in favor of one person, or class of persons, as against another person or class. The defendants insist that it is permitted to common carriers to make reasonable discriminations in the rates demanded from the public; that they are not required to carry for all at the same rates; that discriminations are reasonable which are based upon the quantity of goods sent by different shippers; and that the discrimination in the present case is essentially such a discrimination, and has no element of personal preference, and is necessary for the protection of the defendants.

Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public. Baxendale *v.* Eastern Counties R. Co., 4 C. B. (N. S.) 78; Branley *v.* Southeastern R. Co., 12 C. B. (N. S.) 74; Fitchburg R. Co. *v.* Gage, 12 Gray, 393; Sargent *v.* Boston & L. R. Corp., 115 Mass. 416, 422.[1]

In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves itself into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

The defendants assume to justify upon the theory that a carrier may regulate his charges upon the basis of the quantity of goods delivered to him for transportation by different shippers, and that their discrimination against the plaintiff is in substance one made with reference to

[1] The court here cited passages from the opinions in Messenger *v.* Pennsylvania R. R., 37 N. J. L. 531, and McDuffee *v.* Portland & R. R. R., 52 N. H. 430. — Ed.

the quantity of merchandise furnished by them for carriage. Courts of law have always recognized the rights of carriers to regulate their charges with reference to the quantity of merchandise carried for the shipper, either at a given shipment, or during a given period of time, although public sentiment in many communities has objected to such discriminations, and crystallized into legislative condemnation of the practice. By the English statutes (17 & 18 Vict. c. 31) railway and canal carriers are prohibited from "giving any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, in any respect whatever," in the receiving, forwarding, and delivery of traffic; but under these provisions of positive law the courts have held that it is not an undue preference to give lower rates for larger quantities of freight. Ransome *v.* Eastern C. R. Co., 1 Nev. & McN. 63, 155; Nicholson *v.* Great Western Ry. Co., Id. 121; Strick *v.* Swansea Canal Co., 16 C. B. (N. S.) 245; Greenop *v.* S. E. R. Co., 2 Nev. & McN. 319.

These decisions proceed upon the ground that the carrier is entitled to take into consideration the question of his own profits and interests in determining what charges are reasonable. He may be able to carry a large quantity of goods, under some circumstances, at no greater expense than would be required to carry a smaller quantity. His fair compensation for carrying the smaller quantity might not be correctly measured by the rate per pound, per bushel, or per mile charged for the larger. If he is assured of regular shipments at given times, he may be able to make more economical arrangements for transportation. By extending special inducements to the public for patronage he may be able to increase his business, without a corresponding increase of capital or expense in transacting it, and thus derive a larger profit. He is therefore justified in making discriminations by a scale of rates having reference to a standard of fair remuneration of all who patronize him. But it is impossible to maintain that any analogy exists between a discrimination based upon the quantity of business furnished by different classes of shippers, and one which altogether ignores this consideration, and has no relation to the profits or compensation which the carrier ought to derive for a given quantum of service.

The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for

the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. Such a consideration might be influential in inducing parties to contract in advance; but it has no legitimate bearing upon the value of services rendered without a special contract, or which are rendered because the law requires them to be rendered for a fair remuneration.

A common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself." Nelson, J., in New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344. His obligations and liabilities are not dependent upon contract, though they may be modified and limited by contract. They are imposed by the law, from the public nature of his employment. Hannibal R. R. *v.* Swift, 12 Wall. 262. As their business is "affected with a public interest," it is subject to legislative regulation. "In matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." Waite, C. J., in Munn *v.* Illinois, 94 U. S. 113, 134. It is upon this foundation, and not alone because the business of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation. Illustrations are found in the cases of State *v.* Hartford & N. H. R. Co., 29 Conn. 538; Hooker *v.* Vandewater, 4 Denio, 349; W. U. Tel. Co. *v.* Chicago & P. R. Co., 86 Ill. 246; Coe *v.* Louisville & N. R. Co., 3 Fed. Rep. 775.

The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of

charges paid to obtain the delivery of goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, "as practical and efficient to the ends of justice" as the remedy in equity. Watson *v.* Sutherland, 5 Wall. 74.

The motion for an injunction is granted.

ROOT *v.* LONG ISLAND RAILROAD.

COURT OF APPEALS OF NEW YORK, SECOND DIVISION, 1889.

[114 *N. Y.* 300; 21 *N. E.* 403.]

HAIGHT, J. In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock 250 feet long and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to certain plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of 30 feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor the defendant agreed with Quintard to transport in its cars all the coal in car-loads offered for transportation by him at a rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Water-Works Company, with which company the defendant reserved the right to make a special rate, which should not be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard room and office room free of rent, and the contract was to continue for the term of 10 years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of $2,000 advanced by the defendant, to be paid to Quintard. Pursuant to this agreement the dock and coal pocket were constructed at an expense of $17,000, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract, and it is for the rebate of 15 cents per ton upon the coal so shipped that this action was brought. The defence is that the contract was against public policy, and was therefore illegal and void.

The defendant is a railroad corporation organized under the laws of the State, and was therefore a common carrier of passengers and freight, and was subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different States of the Union. In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination

to individuals; that its charges must be reasonable. Railroad Co. *v.* People, 67 Ill. 11; Vincent *v.* Railroad Co., 49 Ill. 33. In Ohio it was held that where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. Scofield *v.* Railway Co., 43 Ohio St. 571. In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same condition for others is void, as creating an illegal preference; that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation, of goods. Messenger *v.* Railroad Co., 36 N. J. Law, 407; State *v.* Railroad Co., 48 N. J. Law, 55. In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them, as early as means will allow; that it cannot directly exercise unreasonable discrimination as to who and what it will carry; that it cannot impose unreasonable or unequal terms, facilities, or accommodations. McDuffee *v.* Railroad, 52 N. H. 430. To similar effect are cases in other States. Express Co. *v.* Railroad Co., 57 Me. 188; Shipper *v.* Railroad Co., 47 Pa. St. 338; Railroad Co. *v.* Gage, 12 Gray, 393; Menacho *v.* Ward, 27 Fed. Rep. 529. In New York the authorities are exceedingly meagre. The question was considered to some extent in the case of Killmer *v.* Railroad Co., 100 N. Y. 395, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded 10 per cent of the capital actually expended, did not relieve the company from its common law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enter many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others.

Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact, which must ordinarily be determined by the trial court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court. Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates, an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of $17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others. Therefore, in this case, the question is one of fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

LOUGH *v.* OUTERBRIDGE.

COURT OF APPEALS OF NEW YORK, 1894.

[143 *N. Y.* 271; 38 *N. E.* 292.]

O'BRIEN, J. The question presented by this appeal is one of very great importance. It touches commerce, and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial, and there is none now, with respect to the facts upon which it arises. In order to present the question clearly, a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that, for many years prior to the transaction upon which the action was based, had been engaged in business as commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant, the Quebec Steamship Company, is a Canadian corporation, organized and existing under the laws of Canada; and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly 20 years prior to the transaction in question, a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action, the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was 50 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from 50 to 40 cents per dry barrel. About this time the British steamer El Callao, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passengers and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay

in her regular course. The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the El Callao was engaged in obtaining freight and taking on cargo. The plaintiffs' firm had business arrangements with and were shipping by that vessel; and in February, 1892, they demanded of the defendants that they receive 3,000 barrels of freight from New York to Barbadoes, and transport the same at the special rate of 25 cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of 25 cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the El Callao, and that to all other shippers the standard rate of 40 cents per dry barrel was maintained; but they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the 25 cents rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. Again, in the month of May, 1892, the El Callao was in the port of New York taking on cargo, as was also the defendants' steamer Trinidad. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about 1,760 dry barrels of freight at the rate of 25 cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the Trinidad, to sail on June 4th, at 25 cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the Trinidad. The defendants offered these terms to the plaintiffs, but, as they were shipping by the rival vessel, the offer was declined. Except during the week when the El Callao was engaged in taking on cargo, the defendants have maintained the regular rate of 40 cents to all shippers between these points; and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and carried freight for other parties at the reduced rates only upon their entering into a stipulation not to ship by the rival vessel. After the plaintiffs' demand last mentioned had been refused, they obtained an order from one of the judges of the court in this action requiring the defendants to carry the 1,760 barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of 25 cents; but this order was reversed at general term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their

freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of 40 cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial; and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of 25 cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case, which must be recognized at every stage of the investigation. A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive. This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (Watson *v.* Sutherland, 5 Wall. 74; Menacho *v.* Ward, 27 Fed. 529; Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 741; Coe & Milsom *v.* Railroad Co., 3 Fed. 775; Vincent *v.* Railroad Co., 49 Ill. 33; Scofield *v.* Railroad Co., 43 Ohio St. 571), though I am not aware of any in this State that would bring a case based upon such facts within the usual or ordinary jurisdiction of equity. So far as this case is concerned, it is sufficient to observe that it is now settled by a very general concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defence that an adequate remedy at law exists, unless he pleads that defence in his answer. Cogswell *v.* Railroad Co., 105 N. Y. 319; Town of Mentz *v.* Cook, 108 N. Y. 504; Ostrander *v.* Weber, 114 N. Y. 95; Dudley *v.* Congregation, 138 N. Y. 460; Truscott *v.* King, 6 N. Y. 147.

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not now stop to examine a minor question that does not touch the merits, but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and, as they were not then raised, the case must be examined and disposed of upon the merits. The defendants were engaged in a business in which the

public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power. Munn *v.* Illinois, 94 U. S. 113; People *v.* Budd, 117 N. Y. 1. In England these duties are, to a great extent, regulated by the railway and canal traffic act (17 & 18 Vict., c. 31), and by statute in some of the States, and in this country, so far as they enter into the business of interstate commerce, by act of Congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this State that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the general good. There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently; and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public employment to exact from any one anything beyond what under the circumstances is reasonable and just. 2 Kent, Comm. (13th ed.) 598; Story, Bailm. §§ 495, 508; 2 Pars. Cont. 175; Killmer *v.* Railroad Co., 100 N. Y. 395; Root *v.* Railroad Co. 114 N. Y. 300. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary, the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question, into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters must be considered. The carrier can afford to carry 10,000 tons of coal and other property to a given place for less compensation per ton than he could carry 50; and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the

carrier to give him reduced rates. In this case the finding implies that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the State, there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries. Railroad Co. *v.* Gage, 12 Gray, 393; Sargent *v.* Railroad Co., 115 Mass. 422; Steamship Co. *v.* McGregor, 21 Q. B. Div. 544, affirmed 23 Q. B. Div. 598, and by H. L. 17 App. Cas. 25; Evershed *v.* Railway Co., 3 Q. B. Div. 135; Baxendale *v.* Railroad Co., 4 C. B. (N. S.) 78; Branley *v.* Railroad Co., 12 C. B. (N. S.) 74.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But, as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the Supreme Court of Massachusetts in the case of Railroad Co. *v.* Gage, *supra*. Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the restricted right to charge a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done.

If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage." In Evershed *v.* Railway Co., *supra*, Lord Bramwell remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others; and, if the plaintiffs were unable to get the benefit of such rate, it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of Menacho *v.* Ward, 27 Fed. 529, does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary, the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of Judge Wallace: "Unquestionably, a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

But it is urged that the plaintiffs were in fact the only shippers of

goods from New York to Barbadoes by the El Callao, and therefore the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am uable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases, and refuse them in others, where the conditions are different, or to the general public, where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful, or, under all the circumstances, reasouable, is seldom, if ever, material. Phelps *v.* Nowlen, 72 N. Y. 39; Kiff *v.* Youmans, 86 N. Y. 324. The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the El Callao proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire, the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of Steamship Co. *v.* McGregor, *supra*, are applicable: "The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a

right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders." The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only; but to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate, without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.

FINCH, GRAY, and BARTLETT, JJ., concur. PECKHAM, J., dissents. ANDREWS, C. J., not sitting.

Judgment affirmed.

UNITED STATES *v.* CHICAGO & ALTON RAILWAY COMPANY.

DISTRICT COURT OF THE UNITED STATES, 1906.

[148 *Fed.* 646.]

LANDIS, D. J. In this proceeding the Chicago & Alton Railway Company and its vice-president and general freight agent are charged with violating the interstate commerce law by granting rebates. The government having closed its case, the defendants move for an order directing the jury to return a verdict of not guilty.

The material facts are as follows: The Chicago & Alton Company is an interstate carrier, operating a railroad from Kansas City, Mo., to points east; the Belt Railway Company is an interstate carrier operating the belt line connecting Kansas City, Kan., and Kansas City, Mo.; the Schwarzschild & Sulzberger Company is a corporation en-

gaged in the beef-packing business at Kansas City, Kan.; the track of the Alton Company connects with the Belt track at Kansas City, Mo.; and the Belt track connects with the private track of Schwarzschild & Sulzberger, laid and maintained by that corporation on its own property at Kansas City, Kan., occupied also by its packing plant. As required by the interstate commerce law the Alton Company and the Belt Company published and filed tariff schedules announcing to the shipping public what their charges would be for the transportation of packing-house products. The Belt tariff was $3.00 per car from the packing company's track to the Alton connection. The Alton schedule stated that its rate included the Belt Company's charge, so that, in substance, it was as if the Alton road itself connected with the packing company's track. The Alton Company collected from the Schwarzschild & Sulzberger Company the amount of its freight charge as per the published schedules, remitted to the Belt its $3 switching charge, and thereafter paid to Scwharzschild & Sulzberger $1 on each car of the Schwarzschild & Sulzberger product so handled. This practice has obtained since 1901. Prior to that time the Alton Company's tariff likewise included the Belt charge, which was then $4 per car. On collecting the full tariff from the Schwarzschild & Sulzberger Company, the Alton road paid to the Belt its charge of $4 per car, whereupon the Belt gave to the packing company $1 on each loaded car handled. It was at the request of Schwarzschild & Sulzberger (for some reason which does not appear) that for this arrangement was substituted the plan evidenced in the pending cause, whereby the railway company made payment direct to the shipper (some five months after the freight went forward), instead of indirectly through the medium of the Belt line.

The indictment charges that the payment to the packing company was a rebate. The defendants contend that the payment was made by the railway company for its use of the packing company's private track, connecting its shipping dock with the Belt rails; and it is urged in behalf of defendants that, if any provision of the law has been violated, it is only that section requiring the carrier to publish any terminal charge or regulation which alters or determines the aggregate rate for the transportation of property. I am unable to see the force of this contention. The real question here is simply this: "Has the payment back to the shipper of $1 per car out of the money paid by the shipper to the railway company in the first instance resulted in the shipper getting its property transported at a less cost to it than that specified in the published schedules?"

It would seem that to state this question is to answer it. The word "rate," as used in the interstate commerce law, means the net cost to the shipper of the transportation of his property; that is to say, the net amount the carrier receives from the shipper and retains. In determining this net amount in a given case, all money transactions of every kind or character having a bearing on, or relation to, that particular instance of transportation whereby the cost to the shipper is directly

or indirectly enhanced or reduced must be taken into consideration. Applying this test to the case before me, the net cost to the Schwarzschild & Sulzberger Company has been made $1 per car less than the published schedules represented that net cost would be. Viewing the transaction from the standpoint most favorable to the defendants, it amounts to the railway company assuming the cost of getting the shipper's property to the carrier's rails for transportation — a substantial consideration not mentioned in, or contemplated by, the published schedules. With equal propriety (its schedules being silent on the subject) a carrier might, for the purpose of inducing the routing of traffic via its line, pay the consignor's and consignee's bills for the cartage of property between their warehouses and the railway depots.

The object of the statutes relating to interstate commerce is to secure the transportation of persons and property by common carriers for reasonable compensation. No rate can possibly be reasonable that is higher than anybody else has to pay. Recognizing this obvious truth, the law requires the carrier to adhere to the published rate as an absolute standard of uniformity. The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property.

It being my opinion that, when the Alton Company published a specific rate covering packing-house products, collected that rate from the Schwarzschild & Sulzberger Packing Company, and subsequently gave back part of that rate to Schwarzschild & Sulzberger, a device was employed by means of which the packing company's property was transported at a less rate than that named in the published schedules, the defendants' motion will be overruled.

DITTMAR *v.* NEW BRAUNFELS.

COURT OF CIVIL APPEALS, TEXAS, 1899.

[20 *Texas Civil Appeals*, 293.]

FISHER, C. J. Appellant, Dittmar, brought this suit, in the nature of an injunction, to restrain the city of New Braunfels from interfering with his use of water from the water system of New Braunfels for domestic purposes, and to require the city to restore him to his rights as a consumer of water under a contract existing between him and the city, and to connect his residence with the water mains of the city, after the city authorities operating the waterworks, without his consent, had disconnected his residence from the water system, and cut off his supply of water. There is also a claim of damages claimed to have resulted by reason of the wrongful interference of the city with his rights in the use of water. A temporary injunction was granted, but, upon final hearing, general and special demurrers were addressed to the petition, which were sustained, and the case dismissed, from which judgment the appellant has appealed.

Without stating in full the language of plaintiff's petition, the cause of action, as there set out, is substantially as follows: The city of New Braunfels is incorporated under the general laws of this State, and plaintiff is a resident and taxpayer thereof, occupying, with his family, a residence within the limits of the city. The city has in operation, and has had for several years past, a permanent and adequate system of waterworks, which is carried on and conducted by the city for the purpose of supplying the inhabitants water for public and private use. There is an abundant supply of pure and wholesome water, which the city, by the exercise of reasonable diligence in the operation of its waterworks, can continuously furnish the plaintiff and the other inhabitants of the city. This water is used for fire protection and for domestic purposes by the inhabitants, and there is not, within the city, any other source from which the inhabitants can obtain a sufficient and wholesome supply of water. In November, 1895, the appellant entered into a contract with the city, whereby it agreed to furnish him water at his residence, for household purposes, at the rate of one dollar a month, payable quarterly in advance. In pursuance of that contract, at considerable expense to the plaintiff, the amount of which is set out in the petition, the plaintiff's residence was connected with the water system operated by the city, and he, from that time, had promptly paid the water rates due from him, and has complied with all reasonable regulations made by the city for the consumption and use of water; and if any water rent, upon the trial of the case, was found to be due, he was ready and willing to pay the same, and had tendered to the defendant all amounts due it for the use of water. In pursuance of said contract, he continued to use the water for household purposes, at his residence, until May, 1898,

when the defendant, through its servants operating the water system, wrongfully, without his consent, cut off the supply of water from his residence; and thereupon he demanded of the defendant that he be again connected with the water system, and restored to his rights as a consumer, and tendered to the defendant the sum of $12, all of which the defendant refused to do. In 1897 the city passed an ordinance requiring consumers of water for household purposes to enter into a contract, which is styled in the petition as "Exhibit A," as follows: "$12.00. (Ord. Sec. 26.) New Braunfels, Texas, 1897. The city of New Braunfels is requested to connect my property known and described as lots Nos. 9 and 10, on Academy Street, Jahn's addition, in ward No. 4, New Braunfels, Texas, with the waterworks system of said city. The water is wanted and applied and subscribed for under conditions, and for the purposes and uses, following: Household. It is especially agreed and understood, and made a part of the consideration of this contract, that the city of New Braunfels is in no manner to be held liable for any scarcity or failure of water, nor for the quality or quantity thereof, nor for any failure to supply water in the event of fire on the premises, or other casualty or happening. This order is given and signed freely, with the understanding and acquiescence of the terms and conditions above, and with the knowledge and the understanding that, if a contract is desired not containing such a waiver, a higher rate would be demanded by the city, and with the full knowledge and acquiescence of the ordinance of the said city exempting it from liability in the event of failure or scarcity of water, either for fire or domestic purposes. This contract is continuous, and the subscriber is aware of the condition that, should he desire to have the same altered, abated, or cancelled, notice must be given to the city of New Braunfels at least thirty days beforehand; otherwise this contract is to remain in full force. But nothing herein shall be construed to prevent the city from cutting off the supply without notice or liability for damage of any kind, in the event the rate herein called for and specified is not promptly paid when due."

And at the same time the city passed the following ordinances, which are known as sections 27 and 29:

"Section 27. Any person, corporation, or firm desiring a contract or form differing in its conditions from the order given in section 26 hereof, may, by application in writing to the city council of New Braunfels, Texas, have a special contract granted him (or it) at the rate to be fixed by such council, upon the granting of such application, which rate shall not be less than double the amount of the charges in the ordinances set out, except for good reasons to the contrary, shown to the city council."

"Section 29. No connections shall be made nor shall any water be furnished or supplied, unless the owner of the property to be so connected or supplied make his application therefor in writing and form following, to wit: [Here follows the form Exhibit A, leaving

blank the name, lot, street, &c., so as to constitute a printed blank form.]"

This ordinance, as stated in section 27, was intended to give those inhabitants the right to a supply of water who refused to sign and enter into the contract set out in Exhibit A. The plaintiff refused to sign the contract as previously set out, or any of the contracts required by the ordinance as stated in section 27, and for this reason, solely, the city disconnected him from the water system, and refused further to continue furnishing him a supply of water under the contract that he had previously entered into with the city in 1895. It is also averred that it cost the city no more to furnish plaintiff a supply of water for household purposes than it does other inhabitants of the city; that it is furnishing other inhabitants for household purposes a supply of water at the same rate that it agreed to furnish the plaintiff under the contract of 1895. In other words, that there are no dissimilar conditions existing between the plaintiff and the other inhabitants with reference to the cost and expense of furnishing water, and that the city is continuing to furnish other inhabitants an adequate and wholesome supply of water for household purposes at the rate of one dollar per month. The contention of the appellant is that the contract as stated in Exhibit A, and the ordinance upon which it is based, are unreasonable, and therefore void, and that for his refusal to enter into a contract of that nature the city arbitrarily, and without legal reason, cut off his supply of water and disconnected him from the system; that his rights as a consumer were fixed under the contract that he had entered into in 1895, which could not be disturbed, except for reasonable rules and regulations, which it is not questioned the city had the right to make, regarding the use and consumption of water. This court has previously held in the case of Lenzen *v.* City of New Braunfels, which will be found reported in 35 S. W. 341, that a city who by contract owes a duty to a consumer will be required to exercise ordinary care in furnishing and supplying him with the use of water. And the averments of the petition, in terms, state that the purpose of passing the ordinances which are here assailed was to evade the decision of this court in the Lenzen Case; and the averments of the petition, together with the terms of the contract as set out in Exhibit A, impress us with the belief that such was, in part, the purpose of the council of the city in passing the ordinances, and requiring consumers to enter into contracts of the character set out in the exhibit.

A city has the power to require consumers to enter into contracts obligating them to comply with the reasonable rules and regulations which may be imposed for the operation and protection of the water system and for the use of the water; but, as a prerequisite to furnishing a consumer a supply of water, the city has no power to require him to enter into an agreement absolving the city from the duties imposed upon it by the law and release it from liability for its own negli-

gence. The contract in question, which the plaintiff was required to sign, releases the city from liability for any scarcity or failure of supply of water, or for the quality thereof, or for any failure to supply water in the event of a fire or other casualty or happening, and it expressly exempts it from liability for failure or scarcity of water for fire or domestic purposes. It is averred in the petition that the sources from which the city obtained its water will furnish an unlimited supply of a wholesome quality, if the city should conduct its works with due care with reference to its obligation to the consumers. This contract, in terms, releases the city from its obligation to furnish water of good quality and sufficient quantity, and for a failure to supply water in the event of a fire on the premises or other casualty or happening. In other words, the purpose of these stipulations in this contract seems to be that, for any failure or refusal to furnish water to a consumer, either with reference to its quality or quantity, the city should be released from liability. We are clearly of the opinion, in view of the duty that the city owes to its consumers of water, that the imposition of a contract of this nature would be unreasonable, and therefore void. It is probably true, if a consumer had entered into a contract of this nature and the city had undertaken under it to supply him with water, but had violated its duty and obligations resting upon it to furnish him an adequate and wholesome supply of water when it had in its power to do so, that the consumer could have, nevertheless, held it liable for the damages he had sustained; for, although the consumer may have agreed to release the city, still, in urging his rights in an action against it, a court would not have enforced those provisions of the contract which were unreasonable, in that they released the city from its own negligence. While it is true that no obligation would have been created against a consumer by reason of such unreasonable terms in a contract of this nature, still the city has no right to require him to sign and execute a contract of this character as a prequisite to his right to the use and consumption of water, and, upon failure to comply with this unreasonable request, to cut off the supply which he was entitled to by reason of his previous contract.

It is next contended that as the ordinance upon which this contract is based, together with a contract of this nature, are void as being unreasonable, the city could not require him, as a condition for the use of water, to enter into a contract of a nature called for by section 27 of the ordinances. We clearly think the plaintiff is also correct in this contention. It is averred in the petition that the other inhabitants of the city are enjoying the privilege of the use of water under a similar rate as that given to the plaintiff in the contract of 1895, and that the situation and condition of these people is similar to that of the plaintiff. Upon the refusal of the plaintiff to sign the contract, as stated in Exhibit A, the city had no authority, under the averments of the petition, to require him to enter into a contract such as is required in section 27 of the ordinances; for a contract as required by that ordinance

would place a greater burden upon the plaintiff, in requiring him to pay a greater price for the consumption of water for the same purpose than that for which it was furnished the other inhabitants of the city. A city has the power and right to prescribe reasonable charges for the use of water it furnishes to consumers, but it has no power to discriminate between the inhabitants of the city in its charges for the use of water, when they occupy a similar situation.

Reversed and remanded.

INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE & OHIO RAILROAD.

SUPREME COURT OF THE UNITED STATES, 1892.

[145 *U. S.* 263.]

THIS proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati, & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices, as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons travelling together on one ticket will be transported over said lines of road between stations located thereon at two cents per mile *per capita*, which is less than the rate for a single person; said rate for a single person being about three cents per mile."[1] . . .

The cause was heard before the commission, which found "that so-called 'party rate' tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets, within the meaning of section 22 of the act to regulate commerce,[2] and that, when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore & Ohio Railroad Company, do forthwith wholly and immediately cease and desist from

[1] Part of the statement of facts is omitted. — ED.

[2] Act of Feb. 4, 1887; 24 St. 379.

charging rates for the transportation over its lines of a number of persons travelling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. . . .

Mr. Justice BROWN delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the "Interstate Commerce Act" (24 St. 379), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; Fitchburg Railroad Co. *v.* Gage, 12 Gray, 393; Baxendale *v.* Eastern Counties Railway Co., 4 C. B. (N. S.) 63; Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38; Johnson *v.* Pensacola Railway Co., 16 Fla. 623; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the States acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the State, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several States, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several States. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater

compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute, — only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated, as applicable to two individuals, applies to the purchase of a single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as "party rate tickets," and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neigh-

boring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But, assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle, beyond all doubt, that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State, or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, — in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under State laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, — it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously

within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, — trips for long distances, and trips in parties of 10 or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveller, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveller, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25, or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists travelling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita*, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public, generally, a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete

monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously towards any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago, & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device: but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of 10 persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition

of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Hozier *v.* Caledonian Railroad Co., 17 Sess. Cas. (D) 302, 1 Nev. & McN. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So in Jones *v.* Eastern Counties Railway Co., 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in Ransome *v.* Eastern Counties Railway Co., 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than it charged Peterboro merchants, who had made arrangements with it to carry large quantities over its lines, and that the sums charged the Peterboro merchants were

fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In Oxlade *v.* Northeastern Railway Co., 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald *v.* Hovey, 110 U. S. 619.

There is nothing in the objection that party rate tickets afford facilities for speculation, and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party rate ticket, as it appears in this case, is a single ticket covering the transportation of 10 or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two thirds of the regular fare for that number of people. It is possible to conceive that party rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates; but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore

Affirmed.

STATE v. CINCINNATI, NEW ORLEANS, AND TEXAS PACIFIC RAILWAY CO.

SUPREME COURT OF OHIO, 1890.

[47 *Ohio St.* 130.[1]]

BRADBURY, J. . . . The petitions charge, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil connected with the Standard Oil Company, by charging other shippers of like products unreasonable rates, by arbitrarily and suddenly changing the same, and, finally, by confederating with the favored shippers to create and foster a monopoly in refined oil, to the injury of other refiners and the public; and, further, that the defendants claimed and exercised, in contravention of law, the right to charge, for shipping oil in tank-cars, a lower rate of freight per 100 pounds than they charged for shipping the same in barrels, in carload lots. The defendants, by answer, among other matters, denied charging any shippers unreasonable rates of freight, or that they arbitrarily or suddenly changed such rates, and denied any confederacy with any one to establish a monopoly. The actions were referred to a referee, to take the evidence, and to report to this court his findings of fact and conclusions of law therefrom, — all which has been done; and the cases are before us upon this report. . . .

That the Cincinnati, Washington & Baltimore Railway Company did discriminate in its rates for freight on petroleum oil in favor of the Camden Consolidated Oil Company, and that the Cincinnati, New Orleans & Texas Pacific Railway Company did the same in favor of the Chess-Carly Company, is shown by the finding of the referee, which is clearly sustained by the evidence. That these discriminating rates were in some instances strikingly excessive, tended to foster a monopoly, tended to injure the competitors of the favored shippers, and were in many instances prohibitory, actually excluding these competitors from extensive and valuable markets for their oil, giving to the favored shippers absolute control thereof, is established beyond any serious controversy. The justification interposed is that this was not done pursuant to any confederacy with the favored shipper, or with any purpose to inflict injury on their competitors, but in order that the railroad companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of

[1] This case is abridged. — ED.

others; but we do hold that they cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made, and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law. A full and complete discussion of the principles, and a thorough collation of the authorities, bearing upon the duties of railroad companies towards their customers, is to be found in the opinion of Judge Atherton, in the case of Scofield *v.* Railway Co., 43 Ohio St. 571, to which nothing need be now added.

It appears that, of the two methods of shipping oil, — that by the barrel, in carload lots, and that in tank-cars, — the first only was available to George Rice, and the other refiners of petroleum oil at Marietta, Ohio, as they owned no tank-cars, nor did the defendants own or undertake to provide any; but that both methods were open to the Camden Consolidated Oil Company and the Chess-Carly Company, by reason of their ownership of tank-cars, and that the rate per barrel in tank-cars was very much lower than in barrel packages, in box-cars; that in fact the Cincinnati, Washington & Baltimore Railway Company, after allowing the Camden Consolidated Oil Company a rebate, and allowing the Baltimore & Ohio Railway Company for switching cars, received from the Camden Consolidated Oil Company only about one-half the open rates it charged the Marietta refiners, and that both railroad companies claimed the right to make different rates, based upon the different methods of shipping oil, and the fact of the ownership by shippers of the tank-cars used by them. It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers. A railroad is an improved highway. The public are equally entitled to its use. It must provide equal accommodation for all, upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. The true rule is announced by the interstate commerce commission in the report of the case of Rice *v.* Railroad Co. "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight, when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. *v.* Pratt, 22 Wall. 123) and then to offer their use to everybody, impartially." 1 Int. St. Com. R. 547. No doubt, a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier

provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car. The duty of providing suitable facilities for its customers rests upon the railroad company; and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practised at the will of the railroad company, and the favored shipper.

The advantages, if any, to the carrier, presented by the tank-car method of transporting oil over that by barrels, in box-cars, in carload lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty, it could not, in justice, avail itself of its own neglect as a ground of discrimination. It must either provide tank-cars for all of its customers alike, or give such rates of freight in barrel packages, by the carload, as will place its customers using that method on an equal footing with its customers adopting the other method. *Judgment ousting* defendants from the right to make or charge a rate of freight per 100 pounds for transporting oil in iron tank-cars, substantially lower than for transporting it in barrels, in carload lots.

GRIFFIN *v.* GOLDSBORO WATER CO.

SUPREME COURT OF NORTH CAROLINA, 1898.

[112 *N. C.* 206.]

CIVIL action for an injunction, pending in Wayne Superior Court and heard before TIMBERLAKE, J., at Chambers on 19th April, 1898, on a motion to dissolve a restraining order thereto issued. His Honor continued the injunction to the hearing and defendant appealed.

CLARK, J. The defendant corporation is the owner of a plant which supplies water to Goldsboro and its inhabitants under a franchise granted by the city. It has no competition. The complaint alleges that to prevent competition the defendant reduced its rates largely to certain parties who threatened to establish a rival company, but not only did not make a corresponding reduction to the plaintiffs and other customers but proposes to put in meters whereby the rates to plaintiffs and others will be greatly increased, and threatens to cut off the water supply of the plaintiffs if they do not pay the increased rates, which will be to their great injury; that the rates charged by the corporation are not uniform and those charged the plaintiffs are unjust and unreasonable. The defendant denies, as a matter of fact, that the rates charged the plaintiffs are unreasonable and contends, as a proposition of law, that the company's rates are not required to be uniform and that it can discriminate in the rates it shall charge. It also relies upon the schedule of rates contained in the contract with the city and avers that the charges to the plaintiffs do not exceed the rates therein permitted.

The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets and otherwise to take benefit of the right of eminent domain. Besides, from the very nature of its functions it is "affected with a public use." In Munn *v.* Illinois, 94 U. S. 113, which was a case in regard to regulating the charges of grain elevators, it was held that, in England from time immemorial and in this country from its first colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and, where the owners of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must to the extent of that interest submit to be controlled by the public.

Probably the most familiar instances with us are the public mills whose tolls are fixed by statute, and railroad, telegraph, and telephone companies, for the regulation of whose conduct and charges there is a State Commission, established by law. There have been reiterated decisions in the United States Supreme Court and in the several States

affirming the doctrine laid down in Munn *v.* Illinois, *supra*, and as to every class of interest affected with a public use, among others, water companies. Spring Valley *v.* Schottler, 110 U. S. 347. The right of fixing rates is a legislative function which the courts cannot exercise, but it is competent for the courts, certainly in the absence of legislative regulations, to protect the public against the exaction of oppressive and unreasonable charges and discrimination. "The franchise of laying pipes through the city streets and selling water to the inhabitants being in the nature of a public use, or a natural monopoly, the company cannot act capriciously or oppressively, but must supply water to all impartially and at reasonable rates, and an injunction will issue to prevent the cutting off the water supply where the customer offers to pay a reasonable rate and the company demands an unreasonable one." 2 Beach Pri. Corp., Section 834 (c); Munn *v.* Illinois, *supra;* Lumbard *v.* Stearns, 4 Cush. 60. In the 29 A. & E. Enc. 19, it is said: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates." If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like could charge any rates however unreasonable, and could at will favor certain individuals with low rates and charge others exorbitantly high or refuse service altogether, the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one and make alive that of another and instead of being a public agency created to promote the public comfort and welfare these corporations would be the masters of the cities they were established to serve. A few wealthy men might combine and, by threatening to establish competition, procure very low rates which the company might recoup by raising the price to others not financially able to resist — the very class which most needs the protection of the law — and that very condition is averred in this complaint. The law will not and cannot tolerate discrimination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none, and if this is violated, or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other.

While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, those rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. Since the Constitution of 1868, Article VIII, Section 1, if the rates had been prescribed in a charter granted by the Legislature, they would be subject to revocation, and indeed independently of that constitutional

provision, Stone *v.* Farmer's Co., 116 U. S. 307; R. Co. *v.* Miller, 132 U. S. 75; Chicago *v.* Munn, 134 U. S. 418; Georgia *v.* Smith, 70 Ga. 694; Winchester *v.* Croxton, 98 Ky. 739, still less can these rates bind consumers (if unreasonable or discriminating) since the town had authority to grant the franchise but not to stipulate for rates binding upon the citizens. The Legislature did not confer that power. The rates are binding upon the company as a maximum simply because acting for itself it had the power to accept the franchise upon those conditions.

The allegations of fact that the rates are unreasonable and oppressive are denied. That they are not uniform is not denied and the defendant contended that it had the right to discriminate, which cannot be sustained. On the final hearing the cost and value of the property will be material in determining as to the reasonableness of the rates charged. Smyth *v.* Ames (known as the "Nebraska Case"), U. S. Supreme Court, 1898. The evidence offered on that point on the hearing below is not satisfactory, the mere amount of mortgage bonds issued on the property being no reliable guide to the courts as to the true value of the investment. It may be, as sometimes happens, that the bonds and stocks are watered. Nor is the evidence of the cost of construction and operation conclusive, as has often been held, for it may be that the work was extravagantly constructed or is operated under inefficient management and the public are not called on to pay interest upon such expenditures, in the shape of unreasonable or extortionate rates. Missouri *v.* Smith, 60 Ark. 221; Chicago *v.* Wellman, 143 U. S. 339; Livingstone *v.* Sanford, 164 U. S. 578.

The court below properly continued the cause to the hearing.

No error.

COMMONWEALTH *v.* THE DELAWARE AND HUDSON CANAL CO. AND PENNSYLVANIA COAL CO.

SUPREME COURT OF PENNSYLVANIA, 1862.

[43 *Pa. St.* 295.[1]]

THE agreement referred to in the information, after reciting amongst other things, in substance and effect, that it was not for the interest of the canal company that the surplus capacity of its canal for transportation should remain unemployed; that no company would prudently undertake to construct a "railway connecting with it without a certainty of being allowed to transport thereon at a permanent rate of tolls; that with a view to induce capitalists to invest their funds in the construction of a railroad to be connected with the canal, the company had offered a permanent tariff of tolls on all coal entering the canal on any such railroad; provides that the canal company will at all times

[1] This case is abridged. — ED.

hereafter furnish to any and all boats owned or used by the Wyoming Coal Association for the time being, or its assigns, for the purpose of transporting coal entering the canal by railroads connecting with the canal, &c., &c., all the facilities of navigation and transportation which the canal shall afford, when in good and navigable condition and repair, to boats owned or used by any other company or persons, or belonging to or used by or containing coal transported for the canal company, charging and collecting a toll on the coal at a rate per ton to be established in the manner following, viz.: On the 1st day of May in each and every calendar year the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold to be delivered at Rondout, and to arrive by the said canal during the said calendar year, shall be ascertained, and the average price at which such sales have been contracted, shall also be ascertained, and from the average price thus ascertained, $2.50 shall be subtracted, and one-half of the remainder shall be the toll per ton during such calendar year, except that if any discount or deduction, contingent or otherwise, shall be agreed upon or contemplated in the contracts for such sales, the said toll shall be reduced correspondingly to such discount or deduction as shall be actually made. But provided, nevertheless, that if on the 1st day of May, in any calendar year, the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold as aforesaid, shall be less than one-half the estimated sales for such year, the toll during such year shall be calculated in the manner hereinbefore provided on the average price at which the sales of lump coal for such year shall be actually made; and if in any calendar year no sales of the coal of the Delaware and Hudson Canal Company shall be made, then and in that case the toll during such year shall be calculated on the sales for such year of the lump coal of the Wyoming Coal Association for the time being, or its assigns, in the manner hereinbefore provided for, calculating the toll on the sales of the said Delaware and Hudson Canal Company. And in case of an enlargement of the said canal, the said president, managers, and company, and their successors and assigns, may also charge and collect an additional toll on the coal transported in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established after the completion of the said enlargement, in the manner following, viz.: The cost of transportation per ton on the said canal, between the points at which such coal shall enter the said canal and the point on the Rondout creek, at which the said canal meets tidewater, after the full effect of all the improvements previous to the said enlargement shall have been experienced, shall be fairly ascertained or established; the cost of transportation per ton on the said canal between those points after the said enlargement shall have been completed shall also be fairly ascertained or estimated, and one-half of such portion of the reduction in the cost of transportation per ton on the said canal between these points as shall be estimated to have

been produced by the said enlargement, and by no other cause, shall be the additional toll per ton to be thereafter permanently charged."

The contract then provides that until such enlargement the canal company shall not be bound to allow over 400,000 tons to be transported over the canal in any one season, and that after such enlargement it shall not be bound to allow such quantity to be increased so as to exceed in any one season "one-half of the whole capacity for transportation of the said canal, exclusive of the tonnage employed in the transportation of articles other than coal," and the main question was, whether this agreement, made on the 31st day of August, 1847, between the canal company and the Wyoming Coal Association, and renewed with the Pennsylvania Coal Company, was in excess of the legitimate power of said parties.

The defendants were not agreed as to the validity of the contract, the Hudson Canal Company insisting that it was and is contrary to law, while the coal company claimed that it is a valid and binding agreement as between the parties. Separate answers to the information were filed by the defendants, but as the objections to the agreement are all contained in the answers of the canal company, and are sufficiently stated in the opinion of this court, it is unnecessary to repeat them here.

LOWRIE, C. J. . . The information alleges that the agreement in controversy is in excess of the legitimate power of these corporations, and prays that it may be so declared by this court, and that the defendant may be enjoined from acting under it, and also that they may be required to appear and consent to or refuse its cancellation, and for such other decree as may be agreeable to equity. The information would have been formally and substantially improved if it had specially suggested wherein the agreement is in violation of the corporate rights of the defendants. But we may treat this defect as supplied by the answers of the defendants.

The defendants have got into a quarrel among themselves about the agreement, and the canal company confesses and claims that the agreement is contrary to law, while the coal company insists that it is not, and claims that it shall stand as the bond and law of the relations between the parties. It is therefore in the answer of the canal company that we find the objections to the contract specified, and we proceed to consider them.

1. It is objected that the agreement grants to the coal company a monopoly of the one-half of the capacity of the canal of the other party, to the exclusion of the public, because it contracts to furnish to the coal company all the facilities of navigation which the canal will afford, not exceeding one-half of its whole capacity, inclusive of the tonnage employed in the transportation of articles other than coal.

This leaves to all property other than coal its full right of transportation on the canal; but it does profess to give the coal company a right, as against other carriers of coal, to a preference to the extent of

one-half the capacity of the canal. And this may be wrong if it interferes with the claims of others to have their coal carried as cheaply and speedily as that of the coal company. But there is no complaint that anybody has been wronged by this, or that either company has by this actually exercised any function that is exclusive of the public right. When the defendants do in fact transgress the limits of their legitimate functions and interfere with the public rights, then will be the time to bring a charge against them. A mere intention or contract to allow an act that may be wrong, is no ground for an information in law or equity in the nature of the *quo warranto*.

2. It is objected that the agreement, instead of fixed tolls to be collected at the locks according to the charter of the canal company, provides for a rate of toll to be ascertained by the market price of coal in every year, and thus the rate of toll remains uncertain until this price is ascertained, and it cannot therefore be demanded at the locks, and may, in certain states of the coal market, exceed the toll allowed by the charter.

We do not see that this objection involves any public grievance. The canal company has a right to commute its tolls; and we cannot see that the public has any interest in objecting that it may get too much, under the contract of commutation, in a certain contingency, or that it has contracted away part of its means of obtaining the little that it agrees to accept under the contract. At all events, the agreement is, by itself, no actual transgression of proper functions.

3. But the above objection is repeated on behalf of the public; that, on account of the uncertainty of the toll, the canal company cannot always know how much to demand of others, and therefore cannot do equal justice to all according to its public duty as a canal company. 12 Harris, 138; 10 M. & W. 398.

But we find no averment or pretence that the public or any private person has suffered any wrong by reason of this, or that the canal company has been compelled, in obeying this part of the contract, to exercise any functions that do not properly belong to it as a canal company. If it really means to be honest towards the public, we doubt not that it will be able to discover some such reasonable rule of equality in dealing with other carriers that the public will have no reasonable ground of complaint. Exact equality is not demanded, but such a reasonable approximation to it as can be secured by reasonable general rules, free from mere arbitrariness.

4. It is objected that because the tolls are fixed at half the proceeds of the coal after deducting the estimated costs of the production, therefore the canal company is a speculative dealer in coal, which is a departure from the purposes of its creation.

We do not perceive that the conclusion follows from the premises. Measuring toll by the profits on the article when sold, is not becoming a dealer in coal, else government would be a dealer in articles that are subjected to an *ad valorem* tariff. It is very common for the State to

measure taxes according to supposed profits, and we find no public wrong in the canal company doing so in its contract of commutation of tolls.

5. It is objected that such a contract, to be valid, ought to have the sanction of the Legislature, because it affects the interest and income of the State.

But it is not any way shown to us that it does so. Nothing like this is averred in the information, and of course we cannot assume it. If either of these corporations *do* anything under the contract to the interest and income of the State, and contrary to its charter, and this be shown to us in any regular manner, we shall probably interfere and correct it. But we can do nothing arbitrarily. We must have some definite allegation and proof of usurpation before we can do anything. The allegation of mere probabilities of wrong raises no question for our interference.

6. It is objected that, since, under the contract, the tolls are measured by the profits, the coal company has the power by sacrificing the regular profits or a portion of them, to control the coal market, and may at its pleasure so depress the price as to ruin many of those engaged in the trade, and greatly disturb the public interest without any serious injury to itself, and that it did so last spring.

If this had been averred in the information, and proved as one of the grounds of the complaint against the agreement, we should have regarded it as the most serious one of all those that have been urged; but it is neither alleged nor proved by the Commonwealth. And we incline to think that it is properly so, for it seems to us that this objection is founded rather on the abuse of the agreement than on the nature of it, and that the remedy ought to be compensation under the equity, if not the letter, of the agreement, rather than cancellation of it.

Nothing can be more obvious than that the parties intended to adopt a standard by which the tolls were to be indirectly measured. But that can be no standard that may be controlled entirely by the will of either party, and neither can be supposed to have intended such a measure of value. They both meant to fix a standard independent of themselves, and in the public market where we look for the natural standard of value. Both of them, as dealers in the market, would have an influence in fixing the market price, and therefore the standard; but neither of them, dealing according to the fair laws of the trade and of competition in it, could control this standard or would attempt to do it. That is a standard that may well be appealed to, because it is never merely arbitrary, and in trade and in law it is constantly appealed to.

These parties are large dealers in coal, and therefore their sales are, by the agreement, to be taken as a means of ascertaining the market price, and not for the purpose of giving either of them the power to fix that price, or with the thought that either of them might do so. If they arbitrarily use their power to change the standard, they necessarily

destroy its authority as a standard as in their favor; for it is not their will, but the fair market price that is appealed to.

We are not entitled in this case to inquire how far a trading corporation is liable to control or punishment for recklessly raising or depressing prices, for our sole inquiry is concerning the legality of this agreement. We cannot discover any such illegality in it as would justify us in directing its cancellation. Some of the allegations of the canal company seem to show a great abuse of the agreement by the coal company, but the information is in no degree grounded on that, and we cannot inquire of it, and we must volunteer no opinion as to the fact or its consequences or remedy.

Information dismissed.[1]

HOOVER *v.* PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA, 1893.

[156 *Pa. St.* 220.[2]]

TRESPASS for damages for alleged unlawful discrimination.

At the trial, before FURST, P. J., it appeared that, in 1881, the defendant agreed to transport coal from the Snow Shoe district to the works of the Bellefonte Iron & Nail Company for the sum of thirty cents per ton, provided the nail company consumed at least twenty tons per day. It appeared that the coal was to be tariffed at the usual public rate of fifty cents per ton, and that a rebate of twenty cents per ton net would be repaid by the railroad company to the nail company. In 1889, plaintiffs became retail coal dealers in Bellefonte, and were charged by the railroad company the usual public rate for the transportation of their coal.

Mr. Justice GREEN. . . . Let us now see what is the voice of the authorities upon the subject of discriminations in freight charges by carrying companies. The subject is an old one. Prior to any statutes in England or in this country, the common law had pronounced upon the rights and duties of carriers and freighters, and in the enactment of statutes little more has been done than to embody in them the well-known principles of the common law. It happens, somewhat singularly, that the very question we are now considering, of a discrimination in the rates charged to coal dealers and to manufacturers who use coal as a fuel, does not appear to have arisen. And yet it is very certain that such discrimination does prevail, and has prevailed for a long time on all lines of railway and canal. It is highly probable that the absence of litigation upon such discrimination is due to the general

[1] *Compare;* Union Pacific Co. *v.* Goodridge, 149 U. S. 680. — ED.

[2] This case is abridged. — ED.

sentiment of its fairness and justness. Within the writer's knowledge in the section of the State in which he lives, a much greater difference between the rates charged to dealers and those charged to manufacturers by the coal-carrying companies has always existed and now exists, without any question as to its justness or its legality. It is matter of public history that along the valleys of the Lehigh and the Schuylkill there are great numbers of blast furnaces, rolling mills, rail mills, foundries, machine shops, and numerous other manufacturing establishments which consume enormous quantities of the coal output of the State, and at the same time in every village, town, and city which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also prosecuted. And what is true of the eastern end of the State is without doubt equally true throughout the interior and western portions of the Commonwealth, where similar conditions prevail. Yet from no part of our great State has ever yet arisen a litigation which called in question the legality, or the wisdom, or the strict justice of a discrimination favorable to the manufacturing industries as contrasted with the coal-selling industries. This fact can scarcely be accounted for except upon the theory that such discrimination, as has thus far transpired, has not been felt to be undue, or unreasonable, or contrary to legal warrant. In point of fact it is perfectly well known and appreciated that the output of freights from the great manufacturing centres upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. Thus a blast furnace requires great quantities of iron ore, limestone, coke, sand, machinery, lumber, fire bricks, and other materials for the maintenance of its structures and the conduct of its business, none of which are necessary to a mere coal-selling business. These are some of the leading considerations which establish a radical difference in the conditions and the circumstances which are necessarily incident to the two kinds of business we are considering. Another important incident which distinguishes them

is that the establishment of manufacturing industries, and the conducting of their business, necessitates the employment of numbers of workmen and other persons whose services are needed, and these, with their families, create settlements and new centres of population, resulting in villages, towns, boroughs, and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling. In fact that business is one of the results of the manufacturing business and is not co-ordinate with it. The business of the coal dealer is promoted by the concentration of population which results from the establishment of manufacturing industries, and these two kinds of business are not competitive in their essential characteristics, but naturally proceed together, side by side, the coal selling increasing as the manufacturing increases in magnitude and extent. *Judgment for defendant.*[1]

BAILY *v.* FAYETTE GAS-FUEL CO.

SUPREME COURT OF PENNSYLVANIA, 1899.

[193 *Pa. St.* 175.]

ON September 21, 23, and 24, 1898, the defendant company caused to be inserted in the Daily News Standard, published in Uniontown, an advertisement, notifying domestic consumers of natural gas that after October 1, 1898, the rates for gas would be as follows: For heat, twenty-five cents per 1,000 cubic feet; for light, $1.50 per 1,000 cubic feet; and requiring all consumers desiring to use gas for light to notify the company immediately that the light meters might be set. At or about the same time similar notices were mailed to the company's customers. The plaintiff, a resident of Uniontown, saw the notice as published and also received one by mail. On or about October 3, 1898, an employee of the defendant company notified the plaintiff orally that if he did not call immediately at the defendant's office and make arrangements for using the gas for illumination the gas would be shut off, whereupon the plaintiff filed the bill in this case, alleging that the proposed difference in charge for gas used for illuminating and heating purposes is an unjust and unlawful discrimination, and an unreasonable regulation, not made in good faith, but for the benefit of other corporations; that the proposed action of the defendant would be a violation of the plaintiff's rights and the defendant's duties and would work a continuous and irreparable injury to the plaintiff, and praying that the defendant be restrained from shutting off plaintiff's

[1] *Contra:* Hilton Lumber Co. *v.* Atlantic Coast Line, 53 S. E. 823. — ED.

supply of natural gas and from any interference with the connection between its mains or supply pipe and plaintiff's premises, which would prevent him from using natural gas for either heating or illuminating purposes, so long as the plaintiff continues to pay the usual rates charged generally for gas, without discriminating as to the use thereof for illuminating purposes, &c.

MITCHELL, J. The defendant company was chartered under the Act of May 29, 1885, P. L. 29, to produce, transport, supply, &c., natural gas for heat, light, or other purposes. It has been supplying the gas for both heat and light, and proposes to continue doing so, but upon terms making a difference in price according to the use to which the gas is put by the consumer. The question now before us is the reasonableness of this regulation.

In his opinion the learned judge below said, "So far as concerns this case the defendant company may be regarded as incorporated for the purpose of supplying natural gas to consumers for heat and light." Not only did its charter powers cover both uses, but as already said its actual operation has included both, and it is not intended now to abandon either, even if that could be done. The corporate powers are the measure of corporate duties.

The gas is brought by the company through the same pipes for both purposes and delivered to the customers at the same point, the curb. Thence it goes into pipes put in by the consumer, and, after passing through a meter, is distributed by the customer through his premises according to his own convenience. The regulation in question seeks to differentiate the price according to the use for heating or for light. It is not claimed that there is any difference in the cost of the product to the company, the expense of supplying it at the point of delivery or its value to the company in the increase of business or other ways. Some effort was made to show increased risk to the company from the use of gas for lighting purposes, but the evidence of danger was so remote and shadowy that it cannot be considered as more than a mere makeweight. The real argument seeks to justify the difference in price solely by the value of the gas to the consumer, as measured by what he would have to pay for a substitute for one purpose or the other if he could not get the gas. This is a wholly inadmissible basis of discrimination.

The implied condition of the grant of all corporate franchises of even quasi-public nature is that they shall be exercised without individual discrimination in behalf of all who desire. From the inception of the rules applied in early days to innkeepers and common carriers down to the present day of enormous growth of corporations for nearly every conceivable purpose, there has been no departure from this principle. And from all the legion of cases upon this subject the distinguished counsel for the appellee have not been able to cite a single one in which a discrimination based solely on the value of the service to the customer has been sustained. Hoover *v.* Penna. R. Co., 156 Pa.

220, was much relied on by the court below, but was decided on a very different principle. That was an action for damages for unlawful discrimination by a dealer in coal, because a manufacturing company had been allowed a rebate on coal carried to it. But it was held that as the rebate was allowed in consideration of a minimum of coal to be carried per day, and also in view of return freight on the product of the manufacturing company, it was not an unreasonable discrimination; in other words, that the company might look for its compensation not only to the actual money freights from present service, but also to increased business to grow out of the establishment of a new industry in that place. So also Phipps *v.* London & North Western Ry. Co., L. R. 1892, 2 Q. B. 229, cited for appellee, where the decision was put upon the right of the railroad to make special rates for freights from distant points which otherwise it could not get at all. Both cases belong to the numerous class of discrimination sustained on the basis of special advantages to the carrier, not the customer.

Decree reversed, injunction directed to be reinstated and made permanent. Costs to be paid by appellee.

LADD *v.* BOSTON.

SUPREME COURT OF MASSACHUSETTS, 1898.

[170 *Mass.* 332.[1]]

BILL in equity, filed December 31, 1896, alleging the following facts.

The plaintiff is the owner of a building on Pemberton Square in Boston, and the defendant supplies the water to be used therein. The defendant has established, and still continues, fixture rates and meter rates, in accordance with which it requires water takers to pay for the water they use. Many years ago the defendant put a water meter into the building owned by the plaintiff, and has maintained the same there ever since. At the time the meter was put in, the plaintiff, relying upon its continuance, supplied his building very liberally with water fixtures. By the meter rates, the water used in the building amounts to about five dollars each year, but the plaintiff has always paid fifteen dollars per annum, that being the minimum meter rate.

The defendant has recently adopted a policy of removing all meters where it would receive more money from fixture rates, without any regard to the injustice it will work to certain water takers. In accordance with such policy, it now threatens to remove said meter and put the building upon fixture rates, and to shut off the water unless the plaintiff allows it to do so. By fixture rates for all the fixtures in the building

[1] The case is abridged. — ED.

in actual use the plaintiff would be required to pay about one hundred and five dollars per annum. The water fixtures in the building cannot be lessened or rearranged without very great expense, and in no way can they be so lessened or rearranged as to make the fixture rate in any sense reasonable for the quantity of water used. The income from the building has largely decreased in the last few years, and is not sufficient to warrant the payment of such excessive water taxation.

The plaintiff has suggested to the defendant that the minimum meter rate be reasonably increased if it be not now large enough to be just to fixture-rate water takers, and he has offered to furnish his own private meter and pay for repairs on the same if he could thereby continue to enjoy meter rates; but this suggestion has been declined, and this offer refused. If the building is placed upon fixture rates, the plaintiff will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water.

KNOWLTON, J. . . . Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit obtained from it, the number of persons who want it for such a use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city, and upon the interests of property-holders, are all to be considered. Under any general and uniform system other than measuring the water, some will pay more per gallon than others.

It appears by the bill that the plaintiff has so arranged fixtures in his building that he and his tenants can obtain the convenience and benefit of having water to use in many places, while the quantity which they want to use in the whole building, paid for at the rate per gallon charged for measured water, would cost only five dollars per year. He has been accustomed to pay fifteen dollars per year, because, however small the quantity used, that is the lowest sum per year for which water will be furnished under the rules through any meter.

The only averment in the bill which tends to show that the charge for his building after the meter is removed will be unreasonable, is that he "will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water." This means that the arrangement of fixtures in his building is such that, paying by the fixture at the ordinary rate, the aggregate quantity used will be so small as to make the price per gallon twenty times as much as the price paid for measured water where meters are allowed to be used, or the lowest price paid at rates by the fixture where the largest quantities are used through the fixtures. This does not show that charging by the fixture is an improper method. It only shows that the number and arrangement of the fixtures in the plaintiff's building are uneconomical

for the owner as compared with a different construction and arrangement of the conveniences for using water in some other buildings.

The rights of the parties are not affected by the fact that the plaintiff was using a meter when he put in his fixtures. He knew that he had no contract for the future with the city in regard to the mode of fixing the price to be paid for water, and it appears that the quantity which he has been using is only about a third of the smallest quantity for which water is ever charged by the gallon, running through a meter.

The bill does not state a case for relief in equity.

Bill dismissed.

STATE EX REL. CUMBERLAND TELEPHONE AND TELEGRAPH CO. *v.* TEXAS AND PACIFIC RAILROAD CO.

SUPREME COURT OF LOUISIANA, 1900.

[28 *So. Rep.* 284.[1]]

BLANCHARD, J. . . . Defendant company is, *quoad* its lines in Louisiana, a Louisiana corporation. It acquired by purchase and absorption the franchise rights and lines of the New Orleans Pacific Railway Company, which held under a legislative charter from the State of Louisiana, and whose domicile was the city of New Orleans. See Act No. 14, Acts La. 1876, and articles of agreement of consolidation between the Texas Pacific Railway Company and the New Orleans Pacific Railway Company, found in the record. It is not true that the court, in its decree heretofore rendered, has assumed the authority to manage defendant company's railway and to direct the running of its trains. All the decree does is to require of the company the performance of the same service for relator that it has extended to others, notably the Western Union Telegraph Company. The evidence establishes that poles and materials for the construction, repair, and maintenance of the Western Union lines have been distributed by the cars of plaintiff company between stations, and that this has been going on for years, and still goes on. It also establishes that it has been constantly the practice of defendant company to deliver freight for planters and others between stations, and to receive for transportation, at points between stations, rice, sugar, &c. This being shown, it is held that the company may not discriminate, and, when called upon under conditions that are reasonable, must perform the like service for relator; and the duty, being of a public nature, is enforceable by *mandamus*. The evidence also shows that the same service herein required of defendant company has been freely accorded this relator and others by other railroad companies over their lines in this and other States. Relator, it appears, owns its own cars, on which are loaded its tele-

[1] This case is abridged. — ED.

phone and telegraph poles. It applied to defendant company to haul these cars over its lines between New Orleans and Shreveport and throw the poles off, or permit them to be thrown off, at convenient distances. Other railroad companies, operating lines of railway into and out of New Orleans, had done this, and defendant company does the same for the Western Union Telegraph Company, a rival line. It refused the service to relator. That it is the province of the court to say to this common carrier, "What you do for others you cannot refuse to relator," cannot, we think, be seriously questioned. And in so saying, and enforcing by its writs the performance of the duty, it is not apparent that defendant company is denied any of the rights, privileges, and immunities granted to it by the several acts of Congress referred to in the application for rehearing and in the briefs filed on its behalf. The rehearing applied for is denied.

CITY OF MOBILE *v.* BIENVILLE WATER SUPPLY CO.

SUPREME COURT OF ALABAMA, 1901.

[30 *So. Rep.* 445.[1]]

APPEAL from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by the Bienville Water Supply Company against the city of Mobile and others. Demurrers to the bill were overruled, and defendants appeal.

HARALSON, J. . . . 3. The bill alleges that complainant is a corporation chartered by the State for the purpose of supplying and selling water to the city of Mobile and to its inhabitants; that it has laid its mains and pipes in the streets of the city and established its plant at an expense of over $800,000, and is supplying water to customers in the city for family use, sewerage, and other purposes; that the city of Mobile, by an act of the 30th November, 1898, was authorized to construct a system of waterworks and sewers for the use of itself and its inhabitants, and was empowered to collect such rates for water supplied for the use of said sewerage system as shall be sufficient to pay the interest on the bonds issued by it for the purpose of providing said waterworks and sewerage systems and the expenses necessary for operating; such rate not to exceed the usual and customary rates charged by other cities similarly situated for like service.

It was further shown, that by act February 15, 1899, entitled "An Act to promote the health of the city of Mobile," &c. (Act 1898–99, p. 895), the city was empowered to compel connections with its sewers, and for the use thereof, "to fix and charge such reasonable rates for

[1] This case is abridged. — ED.

the purpose of maintaining and operating said sewerage system and paying the interest on the bonds issued by the city of Mobile to build said sewerage system, as said mayor and general council may deem proper;" that it was empowered by another act (Acts 1898–99, p. 16), to issue $750,000 of bonds, secured by mortgage on its water and sewerage system, of which $500,000 was to be used for buying or building waterworks, and $250,000 for buying or building sewers; that it has issued and sold said bonds and built both systems, expending over $500,000 for the water system, and not over $200,000 for the sewer system; that it is operating both systems, and from its waterworks is furnishing water to itself and its inhabitants, and is supplying water on about twenty miles of strects upon which there are no sewers.

The averment is made, that the city has never fixed any rate for the use of its sewers alone, but it will not allow any customers of complainant's water to connect with or use its sewers, except at the same price as the city charges for both its water and sewers together, in effect forcing its citizens and inhabitants to take the water of the city, or to pay for the water of complainant in addition to what each citizen would have to pay for the city's water and sewerage together, discriminating, as is alleged, against complainant and making it, in effect, furnish water for nothing, or to lose its eustomers by reason of the double charges so imposed on them; that the city through its offieers and agents threatens the people of Mobile that they will not be allowed to use the sewers, unless they subscribe for and take the city water, and that they will not be allowed to use the water of complainant in connection with the city's sewers; that the city has the physical power, by means of its police force, to enforce this threat, and it is thus intimidating the customers of complainant, and compelling them to leave complainant and take the water from the city waterworks, and upon their desiring to return, the city, through its officers, have refused to let them disconnect from the city's pipes or to connect with complainant's.

It is further averred that the city charges its own customers on streets where there is no sewer service, the same rate that it charges others for both water and sewers, along streets where said sewers are laid, which, it is alleged, is a discrimination in charges for sewerage, not only against complainant and its customers of water, but also against all consumers of water and customers of the city, not on streets or lincs where the sewers are laid.

It is also averred that the city is insolvent, so that nothing can be made out of it by execution at law.

4. The first, second, third, fourth, and fifth grounds of demurrer to the amended bill may be grouped as raising in different forms, the same question. To state the contention of defendant in the language of counsel, these "grounds of demurrer challenge the sufficiency of the bill as amended, upon the ground that the bill shows that the servants and agents of the city exceeded their power and authority, [and] should have been sustained," the contention being "that said acts and

doings of said officers and agents, as charged in said bill as amended, were void and not binding upon the city of Mobile." The bill alleges, however, very distinctly that the city is committing the wrongs complained of through its officers and agents, a fact the grounds of demurrer specified clearly overlook. The city could, of course, commit the alleged wrongs in no other way, except through its agents and officers. If the acts of the city are warranted by law, it could not be enjoined from committing them. The wrongfulness of these acts is, therefore, the only predicate for relief.

5. The other grounds of demurrer to the original, refiled to the amended bill, and those added to the bill as amended, raise the more serious question to be decided.

From the facts of the case, as above recited, if true, — as they must be taken on demurrer, — it distinctly appears that the city, while it has the authority to do so, has never, by ordinance, fixed any charge or rate for the use of its sewers, and, indeed, is making no charge to its own customers for the use of the same; that it charges any one using its water alone as much as it charges another for the use of both water and sewer; and against those who use the complainant's water, it charges for sewer service alone as much as it charges its own customers for both water and sewerage, — thus making its sewers free to those who use its water, while it imposes on complainant's customers a discriminating and onerous charge for the use of its sewers, — as much, as is alleged, as it charges for its own water and sewerage in addition. Whether intended by the city to so operate or not, one can scarcely conceive of a more effective scheme to deprive the complainant of its customers than the one alleged in the bill. If complainant has to furnish its customers with water, and they are required by the city to pay for sewerage the same price it charges its own customers for its water and sewerage, it follows the complainant would have to furnish water practically free or abandon the business; for it would be unreasonable to suppose that any one would use the complainant's water and bear the additional expense imposed for so doing. These sewers of the city are for the public at large, and every one should be permitted to use them without any discrimination in charges against him. The franchise to construct sewers being in the nature of a public use, the duty is on the city to supply sewerage rates to all impartially on reasonable terms. As is said by Mr. Bates, "All persons are entitled to have the same service on equal terms and on uniform rates." In addition, it is averred, as seen, that citizens are notified by the city that they cannot use its sewers unless they subscribe for the city water, and customers of complainant, desiring to return to it, are forbidden by the city from disconnecting from its pipes and connecting with complainant's, — a threat the city has the physical power to enforce.

If these wrongs exist, they should be remedied. The complainant is far more interested and injured than any one or all of its customers. It cannot live and enjoy the rights and privileges bestowed on it by its

charter, if by unjust discriminations on the part of the city in operating its sewer system, its customers are taken from it. Its customers might not be willing to incur the trouble and odium of litigation to redress the private wrongs thus done to them, even at complainant's expense. But, complainant itself has rights which should be protected against such alleged wrongs, and is entitled to seek redress in its own name. The city should on considerations of highest equity and justice, as by its charter it is authorized to do, fix a rate for sewer service, distinct from the rate fixed for the use of its water, and this rate should be the same to all persons, including the complainant and its customers, or, it should make them free to all, without discrimination. In other words, these sewers should be used to promote the public health, as free to one person as another, or open to all, if any rate of charges is fixed, on equal terms and on uniform charges for their use. No more than this can be justly and legally claimed by the city under its authority from the Legislature, to establish its sewer system.

6. The complainant is entitled, upon the facts stated, to the restraining power of a Court of Equity, to remedy the wrongs of which it complains. These continuing wrongs must work irreparable injury, and, as is alleged, the city, the perpetrator of the wrongs, is insolvent. High, Inj. §§ 1236, 1275; 3 Pom. Eq. Jur. § 1368.

There was no error in overruling the demurrer to the bill.

Affirmed.

PHIPPS *v.* LONDON AND NORTH WESTERN RY. CO.

COURT OF APPEAL, 1892.

[1892, 2 *Q. B.* 229.[1]]

THIS was an appeal against so much of an order of the Railway Commissioners as dismissed an application made by the executors and trustees of the late Mr. Pickering Phipps, an owner of iron furnaces at Duston, for an order enjoining the London and North Western Railway Company to desist from giving undue and unreasonable preference or advantage to the owners of iron furnaces at Butlins and Islip in respect of charges for the conveyance of pig iron to the South Staffordshire markets.

The 2d section of the Railway and Canal Traffic Act, 1854, enacts that no railway company "shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[1] This case is abridged. — ED.

The effect of the 27th and 29th sections of the Railway and Canal Traffic Act, 1888, is shortly as follows : —

By section 27, first, whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges, for the same or similar merchandise or services, than they charge to other traders or classes of traders, or to the traders in another district, or make any difference in treatment in respect of such traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference is to lie on the railway company; and, secondly, in deciding whether a lower charge or difference in treatment amounts to an undue preference, the court, or the commissioners, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant.

By section 29, any railway company may, for the purpose of fixing their rates for the carriage of merchandise on their railway, group together any number of places in the same district situated at various distances from any point of destination or departure of merchandise, and charge a uniform rate in respect thereof, provided that the distances are not unreasonable and no undue preference is created.

The sidings of the Duston furnaces were situated on the London and North Western Railway Company's line at a distance of about sixty miles from Great Bridge, one of the pig iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same line to the east of the Duston furnaces, and at a distance from the market as to Butlins of about seventy-one miles, and as to Islip of about eighty-two miles. Duston was dependent for its railway carriage on the London and North Western Company alone, but Butlins and Islip had both of them access not only to the London and North Western, but also to the Midland Railway. The branch lines on which the Butlins and Islip sidings were situate united at a point to the westward, so that they were nearly equidistant from the western markets. The London and North Western Railway Company had, for charging purposes, grouped Butlins and Islip together; and although they carried the Islip pig iron eleven miles further than the Butlins, they made the same charge from both those places. The Midland Railway also charged the same rate and the same total charge per ton for the carriage from Butlins and Islip.

The London and North Western Railway Company, who carried the Butlins pig iron eleven miles further and the Islip pig iron twenty-two miles further than the Duston pig iron, charged Butlins 0.95*d.* per ton per mile, and Islip 0.84*d.* per ton per mile, while they charged Duston 1.05*d.* per ton per mile; so that the total charge per ton of pig iron from Duston to the western markets was 5*s.* 2*d.*, while the total charge

per ton from either Butlins or Islip was 5*s.* 8*d.* for the same class of merchandise.

The allegation on the part of the plaintiffs was that to charge for the carriage of pig iron from Butlins and Islip to the market only 6*d.* more than for the carriage from Duston was, having regard to the difference of distance, an undue preference by the company in favor of Butlins and Islip as compared with Duston; and they brought this application before the Railway Commissioners under the 2d section of the Railway and Canal Traffic Act, 1854.

The case made by the company was that the comparatively lower rates charged to Butlins and Islip were forced upon them by the competition of the Midland Railway Company; that the lower charge was made *bonâ fide,* and was, in the terms of section 27 of the Act of 1888, "necessary for the purpose of securing in the interests of the public the traffic in respect of which it was made"; that there was still a difference of 6*d.* a ton in favor of the plaintiffs, and that the plaintiffs had not been injured by the rates charged to Butlins and Islip. And they produced evidence to show that the competition in the South Staffordshire market was such that a difference of 6*d.* a ton, or even less, in the price of iron of the same quality, would often be enough to secure a contract.

The Railway Commissioners (Wills, J., Sir Frederick Peel, and Viscount Cobham) held that the London and North Western Railway Company in fixing the rates in question were entitled to take into account the circumstance that Butlins and Islip had access to another line of railway which was in competition with their own, and that not sufficient case of undue preference had been made out against them.

The plaintiffs appealed.

Lord HERSCHELL. . . . One class of cases unquestionable intended to be covered by the section is that in which traffic from a distance of a character which competes with the traffic nearer the market is charged low rates, because unless such low rates were charged it would not come into the market at all. It is certain unless some such principle as that were adopted a large town would necessarily have its food supplies greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situate nearer to it. That is one class of cases, no doubt, intended to be dealt with. I think that is made evident by the fact that they are to consider whether it is necessary for the purpose of securing the traffic, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant. But, of course, it might be said: Well, but the railway company may be obliged, in order to get the traffic, to bring those distant goods at a very cheap rate. But then let them reduce all their

rates on the intervening distances. If a man is nearer the market, let his rate be brought down accordingly, and all the rates will then come down except those from the distant point. But then it was seen there being two ways of creating absolute equality, one by raising the lower rate, another by diminishing the higher rate, there were cases where you would not secure the traffic at all if you raised the lower rate, and where, on the other hand, if, as the condition of securing the traffic, you were to insist on diminishing the higher rate, it would be so diminished as to be quite unfair to the company, and would be unduly reducing the rates charged to the complainant. Therefore, the Legislature said all those matters ought to be taken into account by the commissioners or the court so far as they think it reasonable.

I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence, is one of the circumstances which may be taken into account under those provisions, and which would fall within the terms of the enactment quite as much as the case to which I have called attention. Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this Act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices. Therefore it seems to me that, whether you look at the Act of 1854 by itself, or whether you look at it in connection with the provisions of sub-section 2 of section 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of competing routes. I do not go further than that. It is not necessary to go further than that. I am not for a moment suggesting to what extent it is to weigh. I am not suggesting that there may not be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of the one trader as compared with the other. That may be so, but all that is matter for the tribunal to take into account, and certainly I think that they are entitled to take it into account, and to give weight to it as far as is reasonable. If that be so, it is of course sufficient to dispose of the present case.

Appeal dismissed.[1]

[1] *Compare:* East Tennessee R. R. *v.* Interstate Commerce Commission, 183 U. S. 1. — Ed.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY *v.* INTERSTATE COMMERCE COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1896.

[162 *U. S.* 184.]

MR. JUSTICE SHIRAS delivered the opinion of the court.

The investigation before the Interstate Commerce Commission resulted in an order in the following terms: —

"It is ordered and adjudged that the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company do, upon and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater compensation, in the aggregate, for the transportation in less than car loads of buggies, carriages, and other articles classified by them as freight of first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the State of Ohio, to Social Circle, in the State of Georgia, than they charge or receive for the transportation of said articles in less than car loads for the longer distance over the same line from Cincinnati aforesaid to Augusta, in the State of Georgia, and that the said defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, do also, from and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first-class articles, in less than car loads, from Cincinnati aforesaid to Atlanta, in the State of Georgia, than one dollar per hundred pounds."

The decree of the Circuit Court of Appeals, omitting unimportant details, was as follows: —

"It is ordered, adjudged, and decreed . . . that this cause be remanded to the Circuit Court, with instructions to enter a decree in favor of the complainant, the Interstate Commerce Commission, and against the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on all other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree; and in case they, or any of them, shall fail to obey said order, condemning the said defendants, and each of them, to pay one hundred dollars a day for every day thereafter they shall so fail; and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

It will be observed that in its said decree the Circuit Court of Appeals adopted that portion of the order of the commission which commanded the defendants to make no greater charge on freight carried to Social Circle than on like freight carried to Augusta, and disapproved and annulled that portion which commanded the Cincinnati, New Orleans, & Texas Pacific Railway Company and the Western & Atlantic Railroad Company to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than $1 per 100 pounds.

The railroad companies, in their appeal, complain of the decree of the Circuit Court of Appeals in so far as it affirmed that portion of the order of the commission which affected the rates charged to Social Circle. The commission, in its appeal, complains of the decree, in that it denies the relief prayed for in relation to charges on freight from Cincinnati to Atlanta.

The first question that we have to consider is whether the defendants, in transporting property from Cincinnati to Social Circle, are engaged in such transportation "under a common control, management, or arrangement for a continuous carriage or shipment," within the meaning of that language, as used in the act to regulate commerce.

We do not understand the defendants to contend that the arrangement whereby they carry commodities from Cincinnati to Atlanta and to Augusta at through rates which differ in the aggregate from the aggregate of the local rates between the same points, and which through rates are apportioned between them in such a way that each receives a less sum than their respective local rates, does not bring them within the provisions of the statute. What they do claim is that, as the charge to Social Circle, being $1.37 per hundred pounds, is made up of a joint rate between Cincinnati and Atlanta, amounting to $1.07 per hundred pounds, and 30 cents between Atlanta and Social Circle, and as the $1.07 for carrying the goods to Atlanta is divided between the Cincinnati, New Orleans, and Texas Pacific and the Western and Atlantic, $75\frac{1}{10}$ cents to the former and $31\frac{1}{10}$ cents to the latter, and the remaining 30 cents, being the amount of the regular local rate, goes to the Georgia company, such a method of carrying freight from Cincinnati to Social Circle and of apportioning the money earned, is not a transportation of property between those points "under a common control, management, or arrangement for a continuous carriage or shipment."

Put in another way, the argument is that, as the Georgia Railroad Company is a corporation of the State of Georgia, and as its road lies wholly within that State, and as it exacts and receives its regular local rate for the transportation to Social Circle, such company is not, as to freight so carried, within the scope of the act of Congress.

It is, no doubt, true that, under the very terms of the act, its provisions do not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly

within one State, not shipped to or from a foreign country from or to any State or Territory.

In the answer filed by the so-called "Georgia Railroad Company" in the proceedings before the commission, there was the following allegation: "This respondent says that while no arrangement exists for a through bill of lading from Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made on a through bill of lading, the rate of which was fixed by adding this respondent's local rate from Atlanta to Social Circle to the through rate from Cincinnati to Atlanta."

The answer of the Louisville & Nashville Railroad Company and Central Railroad & Banking Company of Georgia, which companies, as operating the Georgia railroads, were sued by the name of the "Georgia Railroad Company," in the Circuit Court of the United States, contained the following statement: —

"So far as these respondents are concerned, they will state that on July 3, 1891, E. R. Dorsey, general freight agent of said Georgia Railroad Company, issued a circular to its connections, earnestly requesting them that thereafter, in issuing bills of lading to local stations on the Georgia Railroad, no rates be inserted east of Atlanta, except to Athens, Gainesville, Washington, Milledgeville, Augusta, or points beyond. Neither before nor since the date of said circular have these respondents, operating said Georgia Railroad, been in any way parties to such through rates, if any, as may have been quoted, from Cincinnati or other Western points to any of the strictly local stations on said Georgia Railroad. The stations excepted in said circular are not strictly local stations. Both before and since the date of said circular respondents have received at Atlanta east-bound freight destined to strictly local stations on the Georgia Railroad, and have charged full local rates to such stations, said rates being such as they were authorized to charge by the Georgia Railroad commission. Said rates are reasonably low, and are charged to all persons alike, without discrimination."

Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company, was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

We are unable to accept this conclusion. It may be true that the Georgia Railroad Company, as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another State. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of

any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road, and exclude other points.

The Circuit Court sought to fortify its position in this regard by citing the opinion of Mr. Justice Brewer in the case of Chicago & Northwestern Railroad *v.* Osborne, 10 U. S. App. 430, when that case was before the United States Circuit Court of Appeals for the Eighth Circuit. It is quite true that the opinion was expressed that a railroad company incorporated by and doing business wholly within one State cannot be compelled to agree to a common control, management, or arrangement with connecting companies, and thus be deprived of its rights and powers as to rates on its own road. It was also said that it did not follow that, even if such a State corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic originating within the State.

Thus understood, there is nothing in that case which we need disagree with, in disapproving the Circuit Court's view in the present case. All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one State to a point in another, are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a "through bill of lading," we are referring to the usual method in use by connecting companies, and must

not be understood to imply that a common control, management, or arrangement might not be otherwise manifested.

Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between States, under "substantially similar circumstances and conditions."

We do not say that under no circumstances and conditions would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal appointed to enforce the provisions of the statute, whether the commission or the court, to consider whether the existing circumstances and conditions were or were not substantially similar.

It has been forcibly argued that in the present case the commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion.

We understand the record as disclosing that the commission, in view of the circumstances and conditions in which the defendants were operating, did not disturb the rates agreed upon, whereby the same charge was made to Augusta as to Atlanta, — a less distant point. Some observations made by the commission, in its report, on the nature of the circumstances and conditions which would justify a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty.

These views lead to an affirmance of the decree of the Circuit Court of Appeals, in so far as the appeal of the defendant companies is concerned, and we are brought to a consideration of the appeal by the Interstate Commerce Commission.

That appeal presents the question whether the Circuit Court of Appeals erred in its holding in respect to the action of the Interstate Commerce Commission, in fixing a maximum rate of charges for the transportation of freight of the first class in less than car loads from Cincinnati to Atlanta.

This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the commission, namely: Did the court err in not holding that in point of law the Interstate

Commerce Commission had power to fix a maximum rate? and, if such power existed, did the court err in not holding that the evidence justified the rate fixed by the commission, and not decreeing accordingly?

It is stated by the commission, in its report, that "the only testimony offered or heard as to the reasonableness of the rate to Atlanta in question was that of the Vice-President of the Cincinnati, New Orleans, & Texas Pacific Company, whose deposition was taken at the instance of the company." And in acting upon the subject the commission say: —

"This statement or estimate of the rate from Cincinnati to Atlanta ($1.01 per hundred pounds in less than car loads), we believe, is fully as high as it may reasonably be, if not higher than it should be; but, without more thorough investigation than it is now practicable to make, we do not feel justified in determining upon a more moderate rate than $1 per hundred pounds of first-class freight in less than car loads. The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents, as compared with $1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

But when the commission filed its petition in the Circuit Court of the United States, seeking to enforce compliance with the rate of $1 per 100 pounds, as fixed by the commission, the railroad companies, in their answers, alleged that "the rate charged to Atlanta, namely, $1.07 per hundred pounds, was fixed by active competition between various transportation lines, and was reasonably low."

Under this issue evidence was taken, and we learn from the opinion of the Circuit Court that, as to the rate to Birmingham, there was evidence before the court which evidently was not before the commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to 89 cents by the building of the Kansas City, Memphis, & Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and, by reason of water route to the Northwest, such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result.

Without stating the reasoning of the Circuit Court, which will be found in the report of the case in 64 Fed. 981, the conclusion reached was that the evidence offered in that court was sufficient to overcome any *prima facie* case that may have been made by the findings of the commission, and that the rate complained of was not unreasonable.

As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court in respect to the reasonableness of the rate charged on first-class freight carried on defendants' line from Cincinnati to Atlanta; and, as both courts found the existing rate to

have been reasonable, we do not feel disposed to review their finding on that matter of fact.

We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the commission, and first adduce it in the Circuit Court. The commission is an administrative board, and the courts are only to be resorted to when the commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the commission have been disregarded. The theory of the act evidently is, as shown by the provision, that the findings of the commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved.

Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.

We prefer to adopt the view expressed by the late Justice Jackson, when Circuit Judge, in the case of Interstate Commerce Commission *v.* Baltimore & Ohio Railroad Co., 43 Fed. 37, and whose judgment was affirmed by this court, 145 U. S. 263: —

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, — free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The decree of the Circuit Court of Appeals is affirmed.

TEXAS & PACIFIC RAILWAY v. INTERSTATE COMMERCE COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1896.

[162 *U. S.* 197.]

THE object of the bill was to compel the defendant company to obey an order of the Interstate Commerce Commission.[1] . . .

It appears by the bill that, on March 23, 1889, the commission, of its own motion and without a hearing of the parties to be affected, had made a certain order wherein, among other things, it was provided as follows: —

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights." 2 Interst. Commerce Com. R. 658.

Subsequently complaint was made to the Interstate Commerce Commission, in a petition filed by the New York Board of Trade and Transportation, that certain railroad companies were disregarding said order, . . . among them the Texas & Pacific Railway Company, the defendant in the present case. . . .

The answer of the Texas & Pacific Railway Company, admitting that, both before and since March 23, 1889, it had carried imported traffic at lower rates than it contemporaneously charged for like traffic originating in the United States, justified by claiming that through shipments from a foreign country to the interior of the United States differ in circumstances and conditions from shipments originating at the American seaboard bound for the same interior points, and that defendant company has a legal right to accept for its share of the through rate a lower sum than it receives for domestic shipment to the same destination from the point at which the imported traffic enters this country.

The result of the hearing before the Interstate Commerce Commission was, so far as the present case is concerned, that the commission held that the Texas & Pacific Railway Company was not justified in accepting, as its share of a through rate on imported traffic, a less charge or sum than it charged and received for inland traffic between the port of reception and the point of delivery, and the said order of January 29, 1891, commanding that said company desist from distinguishing in its charges between foreign and inland traffic, was made. 4 Interst. Commerce Com. R. 447.

As the Texas & Pacific Railway Company declined to observe said order, the commission filed its present bill against said company in the Circuit Court of the United States for the Southern District of New York.

[1] The statement of facts is much condensed, and part of the opinion is omitted. — ED.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The answer of the Texas & Pacific Railway Company to the petition of the New York Board of Trade and Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the commission filed in the Circuit Court, allege: That rates for the transportation of commodities from Liverpool and London, England, to San Francisco, Cal., are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these, under through arrangements with the Southern Pacific Company, to San Francisco. That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company. That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community, because, if said company is prevented from participating in said traffic, such traffic would move via the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage. That the foreign or import traffic is upon orders by persons, firms, and corporations in San Francisco and vicinity, buying direct of first hands in London, Liverpool, and other European markets; and, if the order of the commission should be carried into effect, it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event. That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City, and other Missouri River points. That by such order the defendant company would be prevented from competing for freight to important points in the State of Texas with the railroad system of that State, having Galveston as a receiving port, and which railroad system is not subject to the control of the Interstate Commerce Commission. These allegations of the answer were not traversed or denied by the commission, but are confirmed by the findings of the commission attached as an exhibit to the petition in the case; and by said findings it further appears that the proportion the Texas & Pacific Railway receives of the through rate is remunerative; that the preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative that can be obtained to put in its cars to pay mileage; that the competition which controls the making of rates to the Pacific coast is steamship by way of the Isthmus and in cheap heavy goods around Cape Horn; that

the competition to interior points, such as Missouri River points and Denver, is from the trunk lines direct from the Atlantic seaboard; that the ships engaged in carrying to San Francisco around Cape Horn are almost wholly British bottoms; that the through bill of lading furnishes a collateral for the transaction of business, takes from the shipper and consignee both the care as to intermediate charges, elevators, wharves, and cost of handling, and puts it on the carrier, reduces the intermediate charges, very much facilitates the transaction of business, and helps to swell its volume; that the tendency of the through bill of lading is to eliminate the obstacles between the producer and consumer, and it has done much in that direction.

These and other uncontroverted facts that appear in this record would seem to constitute "circumstances and conditions" worthy of consideration, when carriers are charged with being guilty of unjust discrimination, or of giving unreasonable and undue preference or advantage to any person or locality.

But we understand the view of the commission to have been that it was not competent for the commission to consider such facts; that it was shut up, by the terms of the act of Congress, to consider only such "circumstances and conditions" as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada.

It is proper that we should give the views of the commission in its own words: —

"The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail, and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation, the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received, and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and, as between these ports, has provided for no publication of tariffs of rates and charges, but has left it to the unrestrained competition of ocean carriers, and all the circumstances and conditions surrounding it. These circumstances and conditions are, indeed, widely different, in many respects, from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regula

tion provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons, in themselves, why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country, destined to a place within the United States, should be carried at a lower rate than domestic traffic from such ports of entry, repectively, to the places of destination, in the United States, over the same line and in the same direction. To hold otherwise would be for the commission to create exceptions to the operation of the statute not found in the statute, and no other power but Congress can create such exception in the exercise of legislative authority.

"In the one case the freight is transported from a point of origin in the United States to a destination within the United States, or port of transshipment, if it be intended for export, upon open published rates, which must be reasonable and just, not unjustly preferential to one kind of traffic over another, and relatively fair and just as between localities; and the circumstances and conditions surrounding and involved in the transportation of the freight are in a very high degree material. In the other case, the freight originates in a foreign country, its carriage is commenced from a foreign port, it is carried upon rates that are not open and published, but are secret, and in making these rates it is wholly immaterial to the parties making them whether they are reasonable and just or not, so they take the freight and beat a rival, and it is equally immaterial to them whether they unjustly discriminate against surrounding or rival localities in such foreign country or not. Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage, arising from the peculiar circumstances and conditions under which that is done; but, when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States, under the operation of the act to regulate commerce, must be under the inland tariff from such port of entry to such place of destination, covering other like kind of traffic in the elements of bulk, weight, value, and of carriage; and no unjust preference must be given to it in carriage or facilities of carriage over other freight. In such case, all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from the port of entry to the place of its destination in the United States. The mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition, under the operation of the act to regulate commerce, which entitles it to lower rates, or any other preference in facilities

and carriage, over home merchandise, or other traffic of a like kind, carried by the inland carrier, from the port of entry to the place of destination in the United States, for the same distance, and over the same line. . . .

"The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates, or charges for, or any difference in the treatment of home and foreign merchandise, in respect to the same or similar service rendered in the transportation, when this transportation is done under the operation of this statute. Certainly, it would require a proviso or exception, plainly ingrafted upon the face of the act to regulate commerce, before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates, or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges, and treatment for similar services rendered.

"The business complained of in this proceeding is done in the shipment of foreign merchandise from foreign ports through ports of entry of the United States, or through ports of entry in a foreign country adjacent to the United States, to points of destination in the United States, upon through bills of lading." 4 Interst. Commerce Com. R. 512–516.

It is obvious, therefore, that the commission, in formulating the order of January 29, 1891, acted upon that view of the meaning of the statute which is expressed in the foregoing passages.

We have, therefore, to deal only with a question of law, and that is, What is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the commission was right, then the order was lawful; otherwise, it was not.

Before we consider the phraseology of the statute, it may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and

the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations, between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several States, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers, — particularly that one which requires uniformity of treatment in like conditions of service.

As, however, the powers of the States were restricted to their own territories, and did not enable them to efficiently control the management of great corporations, whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result.

The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.

Addressing ourselves to the express language of the statute, we find, in its first section, that the carriers that are declared to be subject to the act are those " engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the trans-

portation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State), as well that between the States and Territories as that going to or coming from foreign countries.

In a later part of the section it is declared that "the term 'transportation' shall include all instrumentalities of shipment or carriage."

Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The significance of this language in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious.

Proceeding to the second section, we learn that its terms forbid any common carrier, subject to the provisions of the act, from charging, demanding, collecting, or receiving "from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of the act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," and declare that disregard of such prohibition shall be deemed "unjust discrimination," and unlawful.

Here, again, it is observable that this section contemplates that there shall be a tribunal capable of determining whether, in given cases, the services rendered are "like and contemporaneous," whether the respective traffic is of a "like kind," and whether the transportation is under "substantially similar circumstances and conditions."

The third section makes it "unlawful for any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality to any undue or unreasonable

prejudice or disadvantage in any respect whatever." It also provides that every such common carrier shall afford "all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their respective lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

The fourth section makes it unlawful for any such common carrier to "charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier to charge and receive as great compensation for a shorter as for a longer distance"; and provision is likewise made that, "upon application to the commission appointed under the provisions of the act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property," and that "the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of the act."

The powers of the Interstate Commission are not very clearly defined in the act, nor is its method of procedure very distinctly outlined. It is, however, declared in the twelfth section, as amended March 2, 1889, and February 10, 1891, that the commission "shall have authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of the act." It is also made the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of the act, and for the punishment of all violations thereof. And provision is made for complaints to be made by any person, firm, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, before the commission, and for an investigation of such complaints to be made by the commission; and it is made the duty of the commission to make reports in writing in respect thereof, which shall include the findings of fact upon which the conclusions of the commission are based,

together with its recommendation as to what reparation, if any, should be made by any common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and any fact found.

In the present case no complaint seems to have been made before the commission by any person, firm, company, or other organization, against the Texas & Pacific Railway Company, of any disregard by said company of any provision of the statute resulting in any specific loss or damage to any one; nor has the commission, in its findings, disclosed any such loss or damage to any individual complainant. And it is made one of the contentions of the defendant company that the entire proceeding was outside of the sphere of action appointed by the act to the commission, which only had power, as claimed by defendant, to inquire into complaint made by some person or body injured by some described act of the defendant company.

The complaint in the present case was made by certain corporations of New York, Philadelphia, and San Francisco, known as "boards of trade" or "chambers of commerce," which appear to be composed of merchants and traders in those cities engaged in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities, and manufactured goods generally, and as active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago, and merchants in foreign countries who import direct on through bills of lading issued abroad.

We shall assume, in the disposition of the present case, that a valid complaint may be made before the commission, by such trade organizations, based on a mode or manner of treating import traffic by a defendant company, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to individual persons, corporations, or associations.

We do not wish to be understood as implying that it would be competent for the commission, without a complaint made before it, and without a hearing, to subject common carriers to penalties. It is also obvious that if the commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the commission.

With these provisions of the act and these general principles in mind, we now come to consider the case in hand.

After an investigation made by the commission on a complaint against the Texas & Pacific Railway Company and other companies by the boards of trade above mentioned, the result reached was the order of the commission made on January 29, 1891, a disregard of

which was complained of by the commission in its bill or petition filed in the Circuit Court of the United States.

The Texas & Pacific Railway Company, a corporation created by laws of the United States, and also possessed of certain grants from the State of Texas, owns a railroad extending from the city of New Orleans, through the State of Texas, to El Paso, where it connects with the railroad of the Southern Pacific Company, the two roads forming a through route to San Francisco. The Texas & Pacific Railway Company has likewise connections with other railroads and steamers, forming through freight lines to Memphis, St. Louis, and other points on the Missouri River, and elsewhere.

The defendant company admitted that, as a scheme or mode of obtaining foreign traffic, it had agencies by which, and by the use of through bills of lading, it secured shipments of merchandise from Liverpool and London, and other European ports, to San Francisco and to the other inland points named. It alleged that, in order to get this traffic, it was necessary to give through rates from the places of shipment to the places of final destination, and that in fixing said rates it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also, to some extent, by a competition through the Canada route to the Pacific coast. These rates, so fixed and controlled, left to the defendant company and to the Southern Pacific Company, as their share of the charges made and collected, less than the local charges of said companies in transporting similar merchandise from New Orleans to San Francisco, and so, too, as to foreign merchandise carried to other inland points. The defendant further alleged that unless it used said means to get such traffic the merchandise to the Pacific coast would none of it reach New Orleans, but would go by the other means of transportation; that neither the community of New Orleans, nor any merchant or shipper thereof, was injured or made complaint; that the traffic thus secured was remunerative to the railway company, and was obviously beneficial to the consumers at the places of destination, who were thus enabled to get their goods at lower rates than would prevail if this custom of through rates was destroyed.

As we have already stated, the commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed.

The commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the commission to consider the "circumstances and conditions" attendant upon the foreign traffic as such "circumstances and conditions" as they

are directed in the act to consider. The commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of "unjust discrimination," within the meaning of the act.

In so construing the act, we think the commission erred.

As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly express language must be used in the act, to justify such a supposition.

So far from finding such language, we read the act in question to direct the commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case, among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried, and that the attention of the commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the commission is shut up, by the terms of this act, to solely regard the complaints of one class of the community. We think that Congress has here pointed out that in considering questions of this sort the commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet nevertheless the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.

Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions, and therefore most likely to have been the construction intended by the lawmaking power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation; and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be "reasonable," that discrimination must not be "unjust," and that

preference or advantage to any particular person, firm, corporation, or locality must not be "undue" or "unreasonable," necessarily imply that strict uniformity is not to be enforced, but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous"; whether the kinds of traffic were "like"; whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered, in forming a judgment whether such differences were or were not "unjust." Some charges might be unjust to shippers, others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the commission.

The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is in a given case a preference or an advantage does not, of itself, show that such preference or advantage is undue or unreasonable, within the meaning of the act. Hence it follows that, before the commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

The same observations are applicable to the fourth section, or the so-called "long and short haul provision," and it is unnecessary to repeat them.

The only argument urged in favor of the view of the commission, that is drawn upon the language of the statute, is found in those provisions of the statute that make it obligatory on the common carriers to publish their rates, and to file with the commission copies of joint tariffs of rates or charges over continuous lines or routes operated by more than one common carrier; and it is said that the place at which it would seem that joint rates should be published for the information of shippers would be at the place of origin of the freight, and that this cannot be done, or be compelled to be done, in foreign ports.

The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the commission may not compel all common carriers within the reach of their jurisdiction to publish such rates, and to furnish the commission with all statements or reports prescribed by the statute. Nor was there any allegation, evidence, or finding in the present case that the Texas & Pacific Railway Company has failed to file with the commission copies of its joint tariffs, showing the joint rates from English ports to San Francisco, nor that the company has failed to make public such joint rates in such manner as the commission may have directed.

Another position taken by the commission in its report, and defended in the briefs of counsel, is that it is the duty of the commission to so construe the act to regulate commerce as to make it practically cooperate with what is assumed to be the policy of the tariff laws. This view is thus stated in the report: —

"One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities, for supplying the wants of American consumers at interior places in the United States, and that, under domestic bills of lading, they seek to require from American carriers like service as their foreign competitors, in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute." 4 Interst. Commerce Com. R. 514, 515.

Our reading of the act does not disclose any purpose or intention on the part of Congress to thereby reinforce the provisions of the tariff laws. These laws differ wholly, in their objects, from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government, and those of their provisions, whereby Congress seeks to so adjust rates as to protect Ameri-

can manufacturers and producers from competition by foreign low-priced labor, operate equally in all parts of the country.

The effort of the commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the act to remedy.

Similar legislation by the Parliament of England may render it profitable to examine some of the decisions of the courts of that country construing its provisions.

In fact, the second section of our act was modelled upon section 90 of the English railway clauses consolidation act of 1845, known as the "Equality Clause"; and the third section of our act was modelled upon the second section of the English "Act for the better regulation of the traffic on railways and canals" of July 10, 1854, and the eleventh section of the act of July 21, 1873, entitled "An Act to make better provision for the carrying into effect the railway and canal traffic act, 1854, and for other purposes connected therewith."

One of the first cases that arose under the act of 1854 was that of Hozier *v.* The Caledonian Railway, 1 Nev. & McN. 27, where Hozier filed a petition against the railway company, alleging that he was aggrieved by being charged nine shillings for travelling between Motherwell and Edinburgh, a distance of forty-three miles; while passengers travelling in the same train, and in the class of carriage, between Glasgow and Edinburgh, were charged only two shillings, which was alleged to amount to an undue and unreasonable preference. But the petition was dismissed, and the Court said: "The only case stated in the petition is that passengers passing from Glasgow to Edinburgh are carried at a cheaper aggregate rate than passengers from Motherwell to either of these places. Now, that is an advantage, no doubt, to those passengers travelling between Edinburgh and Glasgow. But is it an unfair advantage over other passengers travelling between intermediate stations? The complainer must satisfy us that there is something unfair or unreasonable in what he complains of, in order to warrant any interference. Now I have read the statements in the petition, and listened to the argument in support of it, to find what there is unreasonable in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none. This petitioner's complaint may be likened to that of the laborer who, having worked all day, complained that others, who had worked less, received a penny like himself."

The case of Foreman *v.* Great Eastern Railway Co., 2 Nev. & McN. 202, was decided by the English railway commissioners in 1875. The facts were that the complainants imported coal in their own ships from points in the north of England to Great Yarmouth, and forwarded the coal to various stations on the defendants' railway, between Great

Yarmouth and Peterborough. The complaint was that the defendants' rates for carrying coal from Yarmouth to stations in the interior, at which complainants dealt, were unreasonably greater than the rates charged in the opposite direction, from Peterborough to such stations, and that such difference in rates was made by the defendants for the purpose of favoring the carriage of coal from the interior, as against coal brought to Yarmouth by sea, and carried thence into the interior over the defendants' railway. The commissioners found that it was true that the defendants did carry coal from the interior to London, Yarmouth, and other seaports on their line, at exceptionally low rates, but that this was done for the purpose of meeting the competition existing at those places. It appeared that the rate from Peterborough to Thetford, fifty-one miles, was four shillings, while the rate from Peterborough to Yarmouth, one hundred miles, was only three shillings. The commissioners said: "As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company cannot be said to prefer other traffic to theirs; nor does the traffic act prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other routes or other modes of carriage with which theirs is in competition."

In Harris *v.* Cockermouth Railway, 1 Nev. & McN. 97, the court held it to be an undue preference for a railway company to concede to the owner of a colliery a lower rate than to the owners of other collieries, from the same point of departure to the same point of arrival, merely because the person favored had threatened to build a railway for his coal, and to divert his traffic from defendant's railway. But Chief Justice Cockburn said: "I quite agree that this court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. . . . As, for instance, in respect of terminal traffic, there might be competition with another railway; and in respect to terminal traffic, as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line."

In the case of Budd *v.* London & Northwestern Railway Co., 4 Nev. & McN. 393, and in London & Northwestern Railway *v.* Evershed, 3 App. Cas. 1029, it was held that it was not competent for the railway company to make discriminations between persons shipping from the same point of departure to the same point of arrival; but, even in those cases, it was conceded that there might be circumstances of competition which might be considered. At any rate, those cases have been much modified, if not fully overruled, by the later cases, particularly in Denaby Main Colliery Co. *v.* Manchester, Sheffield, & Lincolnshire Ry. Co., 11 App. Cas. 97, and in Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229, 236.

The latter was the case of an application, under the railway and canal traffic acts, for an order enjoining the defendants to desist from giving an undue preference to the owners of Butlins and Islip furnaces, and from subjecting the traffic of the complainants to an undue preference, in the matter of the rates charged for the conveyance of coal, coke, and pig-iron traffic, and also for an order enjoining the defendants to desist from giving an unreasonable preference or advantage to the owners of Butlins and Islip furnaces, and the traffic therefrom, by making an allowance of fourpence per ton in respect of coal, coke, and pig iron conveyed for them by the defendants. The sidings of the Duston furnaces, belonging to the complainants, were situated on the London & Northwestern Railway, at a distance of about sixty miles from Great Bridge, one of the pig-iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same railway, to the east of the Duston furnaces, and a distance from the pig-iron market, as to Butlins, of about seventy-one miles, and, as to Islip, of about eighty-two miles. Duston had only access to the London & Northwestern, but Butlins and Islip had access not only to the London & Northwestern, but also to the Midland Railway. The London & Northwestern Company, which carried the Butlins pig iron eleven miles further, and the Islip pig iron twenty-two miles further, than the Duston pig iron, charged Butlins 0.95*d.* per mile, and Islip 0.84*d.* per mile; while they charged Duston 1.05*d.* per mile; so that the total charge per ton of pig iron from Duston to the western markets was 5*s.* 2*d.*, while the total charge per ton from either Butlins or Islip was 5*s.* 8*d.*

When the case was before the railway commissioners it was said by Wills, J.: "It is complained that, although along the London & N. W. Railway every ton of pig iron, every ton of coal, and every ton of coke travels a longer distance in order to reach Islip than in order to reach the applicant's premises, the charge that is put upon it, although greater than the charge which is put upon the traffic which goes to the applicant's premises, is not sufficiently greater to represent the increased distance . . . I first observe that these are, in my judgment, eminently practical questions, and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief, and no good. . . . It seems to me that we must take into account the fact that at Butlins and Islip there is an effective competition with the Midland. Although effective competition with another railway company or canal company will not of itself justify a preference which is otherwise quite beyond the mark, yet still it is not a circumstance that can be thrown out of the question, and I think there is abundance of authority for that. It follows also, I think, from the view which I am disposed to take of these — being eminently practical — questions, that you must give due consideration to the commercial necessities of the companies, as a matter to be thrown in along with the others. . . . I wish emphatically to

be considered as not having attempted to lay down any principles with regard to this question of undue preference, or as to the grounds upon which I have decided it. In my judgment, undue preference is a question of fact in each case."

The railway commissioners refused to interfere, and the case was appealed. Lord Herschell stated the case, and said: —

"This application is made under the second section of the Railway and Canal Traffic Act, 1854, which provides that 'no railway company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.'

"The question, therefore, which the tribunal, whether it be the court or the commissioners before whom such a question comes, has to determine, is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage, as compared with the other. I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

"Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice. And it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, is a question of fact. In Palmer *v.* London & Southwestern Railway Co., L. R. 1 C. P. 593, Chief Justice Erle said: 'I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact, depending on the matters proved in each case.'

"In Denaby Main Colliery Co. *v.* Manchester, &c. Ry. Co., 3 Nev. & McN. 426, when it was before the Court of Appeals, on an appeal arising out of the proceedings before the railway commissioners, Lord Selborne, then Lord Chancellor, said: 'The defendants gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable; but, under these circumstances, is not the reasonableness a question of fact? Is it not a question of fact, and not of law, whether such a preference is due or undue? Unless you can point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is, a mere question, not of law, but of fact.'

"The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself show that it is an undue preference, within the meaning of the act, and, further, that whether there be

such undue preference or advantage is a question of fact, and of fact alone, of the act of 1854. No rule is given to guide the court or the tribunal in the determination of cases or applications made under this second section. The conclusion is one of fact, to be arrived at, looking at the matter broadly, and applying common sense to the facts that are proved. I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction such as is conferred by this section by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to attempt to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, — that is, looking at all the circumstances which are proper to be looked at, because, of course, the very question in this case is whether a particular circumstance ought or ought not to be considered; but, keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. . . . Now, there is no doubt that in coming to their determination the court below did have regard to competition between the Midland and the Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little becomes a question of fact, and not of law. The point is undoubtedly a very important one. . . .

"As I have already observed, the second section of the act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him, by having two competing routes, to enforce upon the carrier by either of these routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who

trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader, in having his works so placed that he has two competitive routes, is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the matter, as a matter of what is reasonable and right as between the two traders, I cannot understand.

"Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantages which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large, — for you are left at large, — as to whether, as between two traders, the company is showing an undue and unreasonable preference to the one, as compared with the other, you are to leave out that circumstance, any more than any other circumstance which would affect men's minds. . . . One class of cases unquestionably intended to be covered by the section is that in which traffic from a distance, of a character that competes with the traffic nearer the market, is charged low rates because, unless such low rates were charged, it would not come into the market at all. It is certain, unless some such principle as that were adopted, a large town would necessarily have its food supply greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance to compete with those situate nearer to it. . . . I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence is one of the cases which may be taken into account under those provisions, and which would fall within the terms of the enactment.

"Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic; it is obvious that these members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charges, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public, by tending to increase prices."

The learned judge then proceeded to discuss the authorities, and pointed out that the case of Budd v. London & Northwestern Railway

Co., and Evershed's Case, are no longer law, so far as the second section of the act of 1854 is concerned.

Lindley and Kay, Lord Justices, gave concurring opinions, and the conclusion of the court was that the commissioners did not err in taking into consideration the fact that there was a competing line together with all the other facts of the case, and in holding that a preference or advantage thence arising was not undue or unreasonable.

The precise question now before us has never been decided in the American cases, but there are several in which somewhat analogous questions have been considered.

Atchison, Topeka, & Santa Fé Railroad *v.* Denver & New Orleans Railroad, 110 U. S. 667, was a case arising under a provision of the Constitution of the State of Colorado which declares "that all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." This court held that under this constitutional provision a railroad company which had made provisions with a connecting road for the transaction of joint business at an established union junction was not required to make similar provisions with a rival connecting line at another near point on its line, and that the constitutional provision is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting line, unless the conditions as to the service are substantially alike in both cases.

The sixth section of the act of Congress (July 1, 1862) relative to the Union Pacific Railroad Company provided that the government shall at all times have the preference in the use of the railroad, "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service." In the case of Union Pac. Railway *v.* U. S., 117 U. S. 355, it was, in effect, held that the service rendered by a railway company in transporting local passengers from one point on its line to another is not identical with the service rendered in transporting through passengers over the same rails.

A petition was filed before the Interstate Commerce Commission by the Pittsburgh, Cincinnati, & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, seeking to compel the latter company to withdraw from its lines of road, upon which business competition with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in the future; also, for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate. The cause was heard before the commission, which held the so-called "party rate tickets," in so far as they were sold for lower rates for each member of a party of ten or more than rates contemporaneously charged for the transporta-

tion of single passengers between the same points, constituted unjust discrimination, and were therefore illegal. The defendant company refusing to obey the mandate of the commission, the latter filed a bill in the Circuit Court of the United States for the Southern District of Ohio, asking that the defendant be enjoined from continuing in its violation of the order of the commission. The Circuit Court dismissed the bills Some of the observations made by Jackson, Circuit Judge, may well be cited (43 Fed. 37): "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation service?" Again: "The English cases establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

The case was brought to this Court, and the judgment of the Circuit Court dismissing the bill was affirmed. Interstate Commerce Commission *v.* Baltimore & Ohio Railroad, 145 U. S. 263. The court, through Mr. Justice Brown, cited with approval passages from the opinion of Judge Jackson in the court below, and, among other things, said: "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable."

Again, speaking of the sale of a ticket for a number of passengers at a less rate than for a single passenger, it was said: "It does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously to any one, it is to the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. . . . If these tickets were withdrawn the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

The conclusions that we draw from the history and language of the

act, and from the decisions of our own and the English courts, are mainly these: that the purpose of the act is to promote and facilitate commerce, by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations; that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that in the exercise of its jurisdiction the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and, in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies, and the welfare of the community which is to receive and consume the commodities, are to be considered; that if the commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.

It may be said that it would be impossible for the commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law making power, and that the general orders made by the commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy.

This is manifest from the facts furnished us in the report and findings of the commission, attached as an exhibit to the bill filed in the Circuit Court.

It is stated in that report that the Illinois Central Railroad Company,

one of the respondents in the proceeding before the commission, averred in its answer that it was constrained, by its obedience to the order of March, 1889, to decline to take for shipment any import traffic, and, to its great detriment, to refrain from the business, for the reason that, to meet the action of the competing lines, it would have to make a less rate on the import than on the domestic traffic.

Upon this disclosure that their order had resulted in depriving that company of a valuable part of its traffic, (to say nothing of its necessary effect in increasing the charges to be finally paid by the consumers,) the commission, in its report, naively remarks, "This lets the Illinois Central Railway Company out." 4 Interst. Commerce Com. R. 458.

We also learn from the same source that there was competent evidence adduced before the commission, on the part of the Pennsylvania Railroad Company, that since that company, in obedience to the order of March, 1889, has charged the full inland rate on the import traffic, the road's business in that particular has considerably fallen off; that the steamship lines have never assented to the road's charging its full inland rates, and have been making demands on the road for a proper division of the through rate; that, if it were definitely determined that the road was not at liberty to charge less than the full inland rate, the result would be that it would effectually close every steamship line sailing to and from Baltimore and Philadelphia.

The commission did not find it necessary to consider this evidence, because the Pennsylvania Railroad Company was before it in the attitude of having obeyed the order.

We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the commission or by the courts below in respect to what were proper rates to be charged by the Texas & Pacific Railway Company. That was a question of fact, and, if the inquiry had been conducted on a proper basis, we should not have felt inclined to review conclusions so reached. But we mention them to show that there manifestly was error in excluding facts and circumstances that ought to have been considered, and that this error arose out of a misconception of the purpose and meaning of the act.

The Circuit Court held that the order of January 29, 1891, was a lawful order, and enjoined the defendant company from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination, or from charging or accepting for its share of through rates upon imported traffic a lower sum than it charges or receives for domestic traffic of like kind, to the same destination, from the point at which the imported traffic enters the country.

In treating the facts of the case, the court says: "It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are, in effect, fixed and controlled by the competition of sailing vessels between these ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the act to regulate commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to revert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic, by reason of the competition referred to, and the revenue derived therefrom, unless it carries at the lower rates, and by so doing is enabled to get part of it, which would otherwise go from London and Liverpool to San Francisco, around the Horn, or by way of the Isthmus." Interstate Commerce Commission *v.* Texas & Pacific Railway, 52 Fed. 187.

The Circuit Court did not discuss the case at length, either as to its law or facts, but, in effect, approved the order of January 29, 1891, as valid, and enjoined the defendant company from disregarding it.

The Circuit Court of Appeals seems to have disapproved of the construction put on the act by the commission. . . .

Having thus intimated its dissent from, or, at least, its distrust of, the view of the commission, the court proceeded to affirm the decree of the Circuit Court and the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that in the present case the disparity in rates was too great to be justified by that condition.

This course proceeded, we think, upon an erroneous view of the position of the case. That question was not presented to the consideration of the Court. There was no allegation in the commission's bill or petition that the inland rates charged by the defendant company were unreasonable. That issue was not presented. The defendant company was not called upon to make any allegation on the subject. No testimony was adduced by either party on such an issue. What the commission complained of was that the defendant refused to recognize the lawfulness of its order; and what the defendant asserted, by way of defence, was that the order was invalid, because the commission had avowedly declined to consider certain "circumstances and conditions," which, under a proper construction of the act, it ought to have considered.

If the Circuit Court of Appeals were of opinion that the commission, in making its order, had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its de-

fence considered, in the first instance, at least, by the commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.

We do not, of course, mean to imply that the commission may not directly institute proceedings in a Circuit Court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty of the court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the commission for the purpose of enforcing an order of its own, the court is authorized to "hear and determine the matter as a court of equity," which necessarily implies that the court is not concluded by the findings or conclusions of the commission; yet, as the act provides that on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the commission has failed, in its proceedings, to give notice to the alleged offender, or has unduly restricted its inquiries, upon a mistaken view of the law, the court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the commission to be lawfully proceeded in.

The mere fact that the disparity between the through and the local rates was considerable, did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination. Much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.

The decree of the Circuit Court of Appeals is reversed. The decree of the Circuit Court is also reversed, and the cause is remanded to that court, with directions to dismiss the bill.

Mr. Justice HARLAN, with whom concurred Mr. Justice BROWN, dissenting.[1]

The question is presented whether the Texas & Pacific Railway Company can, consistently with the act of Congress, charge a higher rate for the transportation of goods starting from New Orleans and destined to San Francisco than for the transportation between the same places of goods of the same kind in all the elements of bulk, weight,

[1] Part of this opinion is omitted. — ED.

value, and expense of carriage, brought to New Orleans from Liverpool on a through bill of lading, and to be carried to San Francisco. If this question be answered in the affirmative; if all the railroad companies whose lines extend inland from the Atlantic and Pacific seaboards indulge in like practices, and if one may do so, all may and will do so; if such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise, and labor, is consistent with the act of Congress — then the title of that act should have been one to regulate commerce to the injury of American interests, and for the benefit of foreign manufacturers and dealers. . . .

I am unable to find in these sections any authority for the commission, or for a carrier subject to the provisions of the act of Congress, to take into consideration the rates established by ocean lines as affecting the charges that an American carrier may make for the transportation of property over its routes. . . .

Congress intended that all property transported by a carrier subject to the provisions of the act should be carried without any discrimination because of its origin. The rule intended to be established was one of equality in charges, as between a carrier and all shippers, in respect of like and contemporaneous service performed by the carrier over its line, between the same points, without discrimination based upon conditions and circumstances arising out of that carrier's relations with other carriers or companies, especially those who cannot be controlled by the laws of the United States. . . .

It seems to me that any other interpretation of the act of Congress puts it in the power of railroad companies which have established, or may establish, business arrangements with foreign companies engaged in ocean transportation, to do the grossest injustice to American interests. I find it impossible to believe that Congress intended that freight originating in Europe or Asia and transported by an American railway from an American port to another part of the United States could be given advantages in the matter of rates, for services performed in this country, which are denied to like freight originating in this country, and passing over the same line of railroad between the same points. To say that Congress so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations. Such a result will necessarily follow from any interpretation of the act that enables a railroad company to exact greater compensation for the transportation from an American port of entry, of merchandise originating in this country, than is exacted for the transportation over the same route of exactly the same kind of merchandise brought to that port from Europe or Asia, on a through bill of lading, under an arrangement with an ocean transportation company. Under such an interpretation the rule established by Congress to secure the public against unjust discrimination by carriers subject to the provisions of the Interstate Commerce Act would be dis-

placed by a rule practically established in foreign countries by foreign companies, acting in combination with American railroad corporations seeking, as might well be expected, to increase their profits, regardless of the interests of the public or of individuals.

I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under an arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendant's railroad. The consumers at San Francisco, or those who may be supplied from that city, have no concern whether the goods reach them by way of railroad from New Orleans, or by water around Cape Horn, or by the route across the Isthmus of Panama. . . .

It is said that the Interstate Commerce Commission is entitled to take into consideration the interests of the carrier. My view is that the act of Congress prescribes a rule which precludes the commission or the courts from taking into consideration any facts outside of the inquiry, whether the carrier, for like and contemporaneous services, performed in this country under substantially similar circumstances and conditions, may charge one shipper more or less than he charges another shipper of like goods over the same route, and between the same points. Undoubtedly, the carrier is entitled to reasonable compensation for the service it performs. But the necessity that a named carrier shall secure a particular kind of business is not a sufficient reason for permitting it to discriminate unjustly against American shippers, by denying to them advantages granted to foreign shippers. Congress has not legislated upon such a theory. It has not said that the inquiry whether the carrier has been guilty of unjust discrimination shall depend upon the financial necessities of the carrier. On the contrary, its purpose was to correct the evils that had arisen from unjust discrimination made by carriers engaged in interstate commerce. It has not, I think, declared, nor can I suppose it will ever distinctly declare, that an American railway company, in order to secure for itself a particular business, and realize a profit therefrom, may burden interstate commerce in articles originating in this country by imposing higher rates for the transportation of such articles from one point to another point in the United States than it charges for the transportation between the same points, under the same circumstances and conditions, of like articles originating in Europe, and received by such company on a through bill of lading issued abroad. Does any one suppose that if the Interstate Commerce bill, as originally presented, had declared, in express terms, that an American railroad company might charge more for the transportation of American freight between two given places in this country than it charged for foreign freight between the same points, that a single legislator would have sanctioned it by his vote? Does any one suppose that an American President would have approved such legislation? . . .

I cannot accept this view, and therefore dissent from the opinion and judgment of the court.

I am authorized by Mr. Justice BROWN to say that he concurs in this opinion.

Mr. Chief Justice FULLER, dissenting.

In my judgment, the second and third sections of the Interstate Commerce Act are rigid rules of action, binding the commission as well as the railway companies. The similar circumstances and conditions referred to in the act are those under which the traffic of the railways is conducted, and the competitive conditions which may be taken into consideration by the commission are the competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside of it.

I am therefore constrained to dissent from the opinion and judgment of the court.

WIGHT *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1897.

[167 *U. S.* 512.]

MR. JUSTICE BREWER delivered the opinion of the court.[1]

In order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore & Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which, for 15 cents per hundred weight, it would bring the beer from Cincinnati, and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him 3½ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage, by whichever road it was carried. His warehouse was, in a direct line, 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to

[1] Part of the opinion is omitted. — ED.

offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting, by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions," within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether, if one shipper has a siding connection with the road of a carrier, it cannot run the cars containing such shipper's freight onto that siding, and thus to his warehouse, at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true, he formally paid 15 cents, but he received a rebate of 3½ cents; and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier, "directly or indirectly by any special rate, rebate, drawback, or other device," to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute; for it requires the common carrier, in publishing schedules, to "state separately the terminal charges, and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase, "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented.

For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is affirmed.

Mr. Justice WHITE concurs in the judgment.

INTERSTATE COMMERCE COMMISSION *v.* DETROIT, GRAND HAVEN, & MILWAUKEE RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1897.

[167 *U. S.* 633.]

MR. JUSTICE SHIRAS delivered the opinion of the court.[1]

The petition of Stone & Carten, retail merchants at Ionia, addressed to the Interstate Commerce Commission, alleged violations by the railway company of sections 2, 3, and 4 of the Interstate Commerce Act.

The opinion of the commission sustained the petition avowedly under section 4 of the act. . . .

The sole complaint urged is that the railway company carts goods to and from its station or warehouse at Grand Rapids without charging its customers for such service, while its customers at Ionia are left themselves to bring their goods to and take them from the company's warehouse, and that, in its schedules posted and published at Grand Rapids, there is no notice or statement by the company of the fact that it furnishes such cartage free of charge. These acts are claimed to constitute violations of sections 4 and 6 of the Interstate Commerce Act. . . .

For a period of upward of twenty-five years before these proceedings this company has openly and notoriously, at its own expense, transferred goods and merchandise to and from its warehouse to the places of business of its patrons in the city of Grand Rapids. The station of the company, though within the limits of the city, is distant, on an average, 1¼ miles from the business sections of the city where the traffic of the places tributary to the company's road originates and terminates. . . .

Under the facts as found and the concessions as made, the Commission's proposition may be thus stated. There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities. But, as there is an average distance

[1] Part of the opinion is omitted.

of 1¼ of a mile between the station at Grand Rapids and the warehouses and offices of the shippers and consignees, such average distance must be regarded as part of the railway company's line, if the company furnishes transportation facilities for such distance; and if it refrains from making any charge for such transportation facilities, and fails to furnish the same facilities at Ionia, this is equivalent to charging and receiving a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

The Circuit Court of Appeals was of opinion that this proposition is based on a false assumption, namely, that the distance between the company's station and the warehouses of the shippers and consignees is part of the company's railway line, or is made such by the act of the company in furnishing vehicles and men to transport the goods to points throughout the city of Grand Rapids. The view of that court was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage. The court, in a learned opinion by District Judge Hammond, enforced this view by a reference to numerous English cases, which hold that the collecting and delivery of goods is a separate and distinct business from that of railway carriage; that, when railroad companies undertake to do for themselves this separate business, they thereby are subjected to certain statutory regulations and restrictions in respect to such separate business; and that they cannot avoid such restrictions by making a consolidated charge for the railway and cartage service. 43 U. S. App. 308.

We agree with the Circuit Court of Appeals in thinking that the fourth section of the Interstate Commerce Act has in view only the transportation of passengers and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company's warehouse or station at Grand Rapids, for the same charges as those received for similar service at Ionia, the duties and obligations cast upon this company by the fourth section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles, or by those furnished by the railway company, would not concern the Interstate Commerce Commission. . . .

The decree of the Circuit Court of Appeals is affirmed.

INTERSTATE COMMERCE COMMISSION *v.* ALABAMA MIDLAND RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1897.

[168 *U. S.* 144.]

ON the 27th day of June, 1892, the board of trade of Troy, Ala., filed a complaint before the Interstate Commerce Commission, at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections; claiming that, in the rates charged for transportation of property by the railroad companies meutioned, and their connecting lines, there was a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint was that, Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and gave the latter an undue preference or advantage, in respect to certain commodities and classes of traffic.[1] . . .

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified. . . .

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Several of the assignments of error complain of the action of the Circuit Court of Appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates to be thereafter charged by the defendant companies for services performed in the transportation of goods.

Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, after elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute, and that, as it did not give the express power to the commission, it did not intend to secure the same result indirectly, by empowering that tribunal, after having

[1] Part of the statement of facts is omitted. — ED.

determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. Cincinnati, New Orleans, & Texas Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 184; Interstate Commerce Commission *v.* Cincinnati, New Orleans, & Texas Pacific Railway, 167 U. S. 479.

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other Northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments, or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities, and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission, under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended in the briefs filed on behalf of the Interstate Commission that the existence of rival lines of transportation, and consequently of competition for the traffic, are not facts to be considered by the commission or by the courts when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case, for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery

and Troy, respectively, and that among the errors assigned is one complaining that the court erred in not holding that the rates prescribed by the commission in its order made due allowance for such dissimilarity.

So, too, in In re Louisville & Nashville Railroad, 1 Interst. Commerce Com. R. 31, 78, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the house bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was, beyond doubt, especially in view."

It is no doubt true that in a later case (Railroad Commission of Georgia *v.* Clyde S. S. Co., 5 Interst. Commerce Com. R. 326) the commission somewhat modified their holding in the Louisville & Nashville Railroad Company Case, just cited, by attempting to restrict the competition that it is allowable to consider to the cases of competition with water carriers, competition with foreign railroads, and competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: Ex parte Koehler, 31 Fed. 315; Missouri Pacific Ry. *v.* Texas & Pacific Ry., Id. 862; Interstate Commerce Commission *v.* Atchison, T. & S. F. Railroad, 50 Fed. 295; Interstate Commerce Commission *v.* New Orleans & Texas Pacific Railroad, 56 Fed. 925, 943; Behlmer *v.* Louisville & Nashville Railroad, 71 Fed. 835; Interstate Commerce Commission *v.* Louisville & Nashville Railroad, 73 Fed. 409.

In construing statutory provisions forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. Denaby

Main Colliery Co. *v.* Manchester, Sheffield, & Lincolnshire Railway, 11 App. Cas. 97; Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229.

But the question whether competition, as affecting rates, is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

In Interstate Commerce Commission *v.* Baltimore & Ohio Railroad, 145 U. S. 263, it was said, approving observations made by Jackson, Circuit Judge (43 Fed. 37), that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road; in other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibitions of the statute, — only such as are unjust or unreasonable"; and, accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual, within the meaning of the first section of the act to regulate commerce, nor make "an unjust discrimination" against him, within the meaning of the second section, nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket, within the meaning of the third section.

In Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, it was held that, "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and, in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign

freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of Wight *v.* U. S., 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase, "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such

cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this: that when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the commission.

The language of the proviso is as follows: —

"That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the Commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions, by reason of not having applied to the Commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of In re Louisville & Nashville Railroad *v.* Interstate Commerce Commission, 1 Interst. Commerce Com. R. 31, 57, the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words, "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful, if it was so before; and that which it fails to forbid the carrier is left at liberty to do, with-

out permission of any one. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences, but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the Circuit Courts. Interstate Commerce Commission *v.* Atchison, Topeka, &c. Railroad, 50 Fed. 295, 300; Interstate Commerce Commission *v.* Cincinnati, N. O. & Tex. Pac. Ry., 56 Fed. 925, 942; Behlmer *v.* Louisville & Nashville Railroad, 71 Fed. 835, 839. And we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do. Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions

may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact, depending on the matters proved in each case. Denaby Main Colliery Co. *v.* Manchester, &c. Ry. Co., 3 Railway & Can. Cas. 426; Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229; Cincinnati, N. O. & Tex. Pac. Ry. *v.* Interstate Commerce Commission, 162 U. S. 184, 194; Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, 235.

The Circuit Court, after a consideration of the evidence, expressed its conclusion thus: —

"In any aspect of the case, it seems impossible to consider this complaint of the board of trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central Railroads, in the matter of the charges upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the Interstate Commerce Act. The conditions are not substantially the same, and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the Commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed; and it is so ordered." 69 Fed. 227.

The Circuit Court of Appeals, in affirming the decree of the Circuit Court, used the following language: —

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The commission finds that no departure from the long and short haul rule of the fourth section of the

statute, as against Troy, as the shorter distance point, and in favor of Montgomery, as the longer distance point, appears to be chargeable to the Georgia Central. The rates in question, when separately considered, are not unreasonable or unjust. As a matter of business necessity, they are the same by each of the railroads that reach Troy. The Commission concludes that as related to the rates to Montgomery, Columbus, and Eufaula the rates to and from Troy unjustly discriminate against Troy, and, in the case of the Alabama Midland, violate the long and short haul rule.

"The population and volume of business at Montgomery are many times larger than at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama River, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated, by the traffic association, in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent, or under the bias of any personal preference for Montgomery or prejudice against Troy, that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates; and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects, to a degree less or more, all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination, if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by the Board of Trade. We do not discuss the third and fourth contention of the counsel for the appellant, further than to say that within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or

unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." 41 U. S. App. 453.

The last sentence in this extract is objected to by the commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the commission, and afterwards by the Circuit Court and by the Circuit Court of Appeals.

The first contention we encounter upon this branch of the case is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute, and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact, and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court

is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.

In the case of Cincinnati, N. O. & Texas Pac. Railway *v.* Interstate Commerce Commission, 162 U. S. 184, the findings of the commission were overruled by the Circuit Court, after additional evidence taken in the court, and the decision of the Circuit Court was reviewed in the light of the evidence, and reversed, by the Circuit Court of Appeals; and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that, as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the Circuit Court of Appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the Circuit Court of Appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence, and in this court to review their decisions.

So in the case of Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, the decision of the Circuit Court of Appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that in the case under consideration the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the Circuit Court had no jurisdiction to consider the evidence, and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act, authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the Commission."

Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the Commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the parties, and of the evidence adduced in their support; giving effect, however, to the findings of fact in the report of the Commission, as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by

either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts, by making an allowance in the rates prescribed for dissimilarity resulting from competition; and it was contended on behalf of the Commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the Commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

Mr. Justice HARLAN, dissenting. — I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body, for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to

secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce — when their interests will be subserved thereby — to build up favored centres of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.

OCEAN STEAMSHIP COMPANY *v.* SAVANNAH LOCOMOTIVE WORKS.

SUPREME COURT OF GEORGIA, 1909.

[131 *Ga.* 831.[1]]

EVANS, P. J.

The principal complaint of the complaining lumber dealer is against the system of booking cotton for a particular vessel in advance of its sailing day. It is said that this practice results in accumulating large quantities of lumber and cotton at the port of Savannah beyond the immediate carrying capacity of the steamship company's vessels, and that "booked" cotton is transported in preference to lumber tendered subsequent to the booking but prior to the arrival and receipt of the "booked" cotton; and that the steamship company refuses to accord to lumber dealers the privilege of booking their commodity. The system of "booking," as explained in the record, is the practice of the steamship company to make specific engagements with shippers of cotton for a reservation of space for cotton to be shipped on a particular vessel, in advance of its sailing day. If the steamship company indifferently extended this privilege to all of its patrons and to all commodities, we do not think it would violate any duty which it owed the public. The basal principle of the requirement of the common law that a common carrier must convey the goods of all persons offering to pay his hire, unless his carriage be already full, is that there should be no unjust preference given one member of the public over another. The practice of making specific engagements in advance of the shipment, if the privilege is indifferently extended to all, is but another form of acceptance of goods tendered in the order of their application. The same impartiality of service is rendered when public notice is given by the carrier that he will "book" the freight of all patrons, and reserves space for the goods engaged to be transported as if he had received the goods of the shipper in the order of their tender. But when a carrier reserves space in his carriage for a favored patron, or a favored commodity, not perishable in its nature, and refuses to reserve space for another patron or commodity, he fails to afford that commonness of service which the law annexes as an incident to his business. The steamship company may discontinue to carry any particular commodity it desires, or it may voluntarily cease to do business as a common carrier and engage in the business of a

[1] Only the concluding paragraphs of the opinion are printed. — ED.

special carrier; but so long as it pursues the business of a common carrier, it is bound to render to the public the service which the law exacts of a common carrier.

The requirement of the common law that a common carrier must receive goods offered for transportation in the order of their tender cannot, on principle, be affected either by the place where the shipment originates, or by the ultimate destination of the goods. There is no reason why the steamship company should prefer freight tendered in a car from one forwarding agency, and deny freight similarly tendered by another forwarding agency or shipper. If the steamship company desires an inland carrier to issue through bills of lading, it may do so subject to its obligations to receive and carry freight in the order of its tender. The mere fact that a particular commodity is destined to a foreign port cannot justify a carrier in giving a preference to it over the same or another commodity because the latter may be a domestic shipment. It is urged that in apportioning its space to the various commodities, according to the volume of freight at the port, no discrimination was shown by the steamship company against lumber shipments in favor of cotton or other articles of commerce. Some of the reasons advanced are, that the steamships are built with a view to the packet trade; that lumber is bulky, and cannot be as expeditiously handled as cotton; that the vessels are advertised to sail on particular days, and to require a greater percentage of lumber to be carried than was carried would not enable the vessels to observe their sailing dates; that there is a congestion of freight, and a larger percentage of lumber than of cotton is carried; that cotton moves only within three or four months of the year, whereas lumber moves evenly throughout the year; that the price of cotton is liable to fluctuation, while that of lumber is more constant; that cotton is the great staple crop of the State of Georgia, and that a larger number of the public is served by the prompt transportation of cotton to the preference of lumber. With respect to the contention that if the steamship company accepted all the lumber which was tendered to it, its vessels could not sail at the advertised times, the evidence was in conflict. As previously indicated, the steamship company is under no duty to carry all the freight of the port of Savannah; so that the main question on the facts is whether cotton possesses such inherent qualities as to permit a preference to be given to that commodity over all other articles which the steamship company customarily carries. We fully appreciate the value of the South's great staple product, and are aware that for years the slogan has been that "cotton is king." But the great value of the cotton crop and the importance of its prompt transportation gives to that staple no imperial rights over the other products of

this State. It is not perishable in its nature, and it will not be contended that its fluctuation in price is so violent that a delay in transportation would substantially destroy its value. On the whole, after a careful consideration, we think that under the legal principles applicable to the facts of the case there was no abuse of discretion in the grant of an *ad interim* injunction. The terms of the injunction did not extend to matters outside of the pleadings, nor are they indefinite and uncertain.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

HOUSTON, EAST & WEST TEXAS RAILROAD COMPANY *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1914.

[234 *U. S.* 342.[1]]

MR. JUSTICE HUGHES delivered the opinion of the court.

The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation. It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. The Commerce Court sustained the authority of the Commission and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate.

[1] An extract only is printed. — ED.

The further objection is made that the prohibition of section 3 is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. East Tennessee &c. Ry. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 18. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention is thus merely a repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not unmindful of the gravity of the question that is presented when State and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

In conclusion: Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* HENDERSON ELEVATOR COMPANY.

SUPREME COURT OF THE UNITED STATES. 1913.

[226 *U. S.* 441.]

Memorandum opinion, by direction of the court, by Mr. Chief Justice WHITE.

The Henderson Elevator Company, defendant in error, as plaintiff below brought this action to recover damages from the Railroad Company, the plaintiff in error, because of a loss alleged to have been sustained by an erroneous quotation by the agent of the Railroad Company of the freight rate on corn shipped in interstate commerce from the station of the Railroad Company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent when in fact the rate as fixed by the published tariff on file with the Interstate

Commerce Commission and effective at the time was 13½ cents per hundred pounds. On the trial before a jury the court instructed that if the loss sustained by the plaintiff "was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Kentucky, its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains, . . ." there should be a verdict for the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction and the judgment entered thereon having been subsequently affirmed by the Court of Appeals of Kentucky (138 Kentucky, 220), this writ of error was sued out.

It is to us clear that the action of the court below in affirming the judgment of the trial court and the reasons upon which that action was based were in conflict with the rulings of this court interpreting and applying the Act to Regulate Commerce. New York Cent. R. R. *v.* United States (No. 2), 212 U. S. 500, 504; Texas & Pacific R. R. Co. *v.* Mugg, 202 U. S. 242; Gulf Railroad Co. *v.* Hefley, 158 U. S. 98. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. Kansas City So. Ry. Co. *v.* Albers Comm. Co., 223 U. S. 573, 594 (*a*).

Reversed.

UNITED STATES EX REL. *v.* UNION STOCK YARD & TRANSIT COMPANY.

SUPREME COURT OF THE UNITED STATES, 1912.

[226 *U. S.* 286.[1]]

MR. JUSTICE DAY delivered the opinion of the Court.

By § 2 of the Act to Regulate Commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced. By the very terms of the con-

[1] Only the conclusion of the case is printed. — ED.

tract it is evident that the interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfælzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive $50,000, and it obligates them to maintain and operate the plant for a period of fifteen years and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so bought to pay the regular charges thereon as if the same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of $50,000, with the bonus given to the Pfælzers for the location of their plant in juxtaposition to the stock yards. The only interest which the Stock Yard Company has in Pfælzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Company in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfælzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departures from published rates — and we must consider the case in that light — and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract.

UNITED STATES *v.* BALTIMORE & OHIO RAILROAD CO.

SUPREME COURT OF THE UNITED STATES, 1913.

[231 *U. S.* 274.[1]]

MR. JUSTICE LURTON delivered the opinion of the court.

To say that the "allowance" made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents for the several lessees using the station, and their staff of employés engaged in receiving, delivering, loading and unloading freights thus received, both incoming and outgoing. As the measure of compensation is the tonnage in and out of the station and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments. But they receive the same compensation upon the tonnage of every other shipper through that station, and it is the aggregate of the compensation which must determine the reasonableness of the allowance when we come to deal with it as an allowance to them for services or instrumentalities furnished, under section 15 of the Act to Regulate Commerce.

THE INTERMOUNTAIN RATE CASES.

SUPREME COURT OF THE UNITED STATES, 1914.

[234 *U. S.* 476.[2]]

CHIEF JUSTICE WHITE delivered the opinion of the court.

The main insistence is that there was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix a reasonable rate to the intermediate points, that is to say, that under the power transferred to it by the section as amended the Commission was limited to ascertaining the existence of competition and to author-

[1] Only one point is printed. — ED.

[2] Only an extract is printed. — ED.

izing the carrier to meet it without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it and with the plain purpose and intent manifested by its enactment. To uphold the proposition it would be necessary to say that the powers which were essential to the vivification and beneficial realization of the authority transferred had evaporated in the process of transfer and hence that the power perished as the result of the act by which it was conferred. As the prime object of the transfer was to vest the Commission within the scope of the discretion imposed and subject in the nature of things to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act with authority to consider competitive conditions and their relation to persons and places, necessarily there went with the power the right to do that by which alone it could be exerted, and therefore a consideration of the one and the other and the establishment of the basis by percentages was within the power granted.